(12)

No. 92-484-CFX Title: United States National Bank of Oregon, Petitioner
Status: GRANTED v.
Independent Insurance Agents of America, Inc., et al.

Docketed:
September 18, 1992 Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
92-507 Counsel for petitioner: Bachman,Kenneth, Solicitor General

Counsel for respondent: Sallet,Jonathan, Kappler,Ann M., Solicitor General, Scall,Lester N.

8-7-92 ext til 9-21-92, C.J. Rehnquist

Entry	Date	Note	Proceedings and Orders
1	Aug 6 1992	G	Application (A92-105) to extend the time to file a petition for a writ of certiorari from August 20, 1992 to September 21, 1992, submitted to The Chief Justice.
2	Aug 7 1992		Application (A92-105) granted by the Chief Justice extending the time to file until September 21, 1992.
3	Sep 18 1992	G	Petition for writ of certiorari filed.
5	Sep 29 1992		Order extending time to file response to petition until November 21, 1992.
7	Nov 20 1992		Brief amici curiae of American Bankers Association, et al. filed. VIDED.
8	Nov 20 1992		LODGING consisting of nine copies of one document received from amici, American Bankers Assn., et al.
12	Nov 21 1992		Brief amici curiae of Kentucky Bankers Assn., et al. filed.
9	Nov 23 1992		Brief of respondents Independent Insurance Agents of America, et al. in opposition filed. VIDED.
6	Nov 24 1992		DISTRIBUTED. December 11, 1992
10	Dec 1 1992		Reply brief of petitioner filed.
11	Dec 14 1992		Petition GRANTED.
			**********
17	Jan 11 1993		Record filed.
		*	Partial proceedings United States Court of Appeals for the District of Columbia Circuit.
13	Jan 25 1993	G	Motion of the Acting Solicitor General to dispense with printing the joint appendix filed.
18	Jan 25 1993		Record filed.
		*	Original proceedings United States District Court for the District of Columbia.
14	Jan 28 1993		Brief of petitioner United States National Bank of Oregon filed.
15	Jan 28 1993		LODGING consisting of 40 copies of legislative material received from the petitioner
16	Jan 28 1993		Brief of Federal petitioners filed. VIDED.
19	Jan 28 1993		Brief amici curiae of American Bankers Associaation, et al. filed. VIDED.
21	Feb 4 1993	D	Motion of the Acting Solicitor General for divided argument filed.
22	Feb 22 1993		Motion of the Acting Solicitor General to dispense with printing the joint appendix GRANTED.

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No. 92-484-CFX

Entry	Date	Note	Proceedings and Orders
23	Feb 22 1993		Motion of the Acting Solicitor General for divided argument DENIED.
24	Mar 3 1993		LODGING consisting of nine copies of legislative history received from the respondents
25	Mar 3 1993		Brief of respondents Independent Insurance Agents of America, et al. filed. VIDED.
26	Mar 5 1993		SET FOR ARGUMENT MONDAY, APRIL 19, 1993. (1ST CASE).
27	Mar 10 1993		CIRCULATED.
28	Apr 2 1993	X	Reply brief of petitioner United States National Bank of Oregon filed. VIDED.
29	Apr 5 1993	X	Reply brief of Federal petitioners filed. VIDED.
30	Apr 19 1993		ARGUED.

92-484

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Section 92 of the National Bank Act, 12 U.S.C. § 92, which authorizes national banks in certain circumstances to solicit and sell insurance, remains in force.

2. Should the court of appeals have determined whether Section 92 of the National Bank Act remains in force, where the parties neither presented nor took adverse positions on that issue.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Independent Insurance Agents of Oregon, the National Association of Casualty & Surety Agents, the National Association of Surety and Bond Producers, the National Association of Life Underwriters, the National Association of Professional Insurance Agents, the Oregon Association of Life Underwriters, and the Oregon Professional Insurance Agents, Inc. were plaintiffs in the district court and appellants in the court of appeals. Robert L. Clarke, Comptroller of the Currency, and the Office of the Comptroller of the Currency were defendants in the district court and appellees in the court of appeals. The United States was a defendant in the district court.

The following information is provided under Rule 29.1 of the Rules of this Court: The parent company of petitioner United States National Bank of Oregon is U.S. Bancorp, whose shares are publicly held.

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INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner United States National Bank of Oregon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-29a), is reported at 955 F.2d 731. The opinion of the district court (App., *infra*, 40a-66a) is reported at 736 F. Supp. 1162.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. Petitions for rehearing were denied on May 22, 1992. App., *infra*, 30a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752 (a portion of which was codified at 12 U.S.C. § 92), is reprinted at App., *infra*, 67a-76a. Section 5202 of the Revised Statutes is reprinted at App., *infra*, 77a. Section 13 of the Federal Reserve Act, ch. 6, Pub. L. No. 63-43, 38 Stat. 251, 263-64 (1913), is reprinted at App., *infra*, 77a-80a. Section 20 of the War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, 40 Stat. 506, 512, is reprinted at App., *infra*, 80a-81a.

STATEMENT

A. The Statutory and Regulatory Scheme

1. Congress has vested the Comptroller of the Currency with substantial supervisory authority over the formation, supervision, and operation of national banks. The Comptroller exercises such authority principally under the National Bank Act (NBA), 12 U.S.C. §§ 21 *et seq.* *See, e.g., Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).[1]

2. The NBA, among other things, defines the powers of national banks. Under Section 92 of the NBA, 12 U.S.C. § 92, which Congress enacted in 1916, a national bank

> located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of

[1] Congress has delegated to the Comptroller the authority for promulgating rules and regulations under the NBA. *See* 12 U.S.C. § 93a.

> the State in which said bank is located to do business in said State.

Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752.[2]

Under a longstanding regulation, the Comptroller has applied the authority set forth in Section 92 to any national bank branch office "located in a community . . . of less than 5,000," regardless of whether the bank's principal office is located in a larger community. 12 C.F.R. § 7.7100.[3] Under other regulations, the Comptroller has required any national bank wishing to perform such "new activities" through a subsidiary to submit a written proposal to the Deputy Comptroller for the district in which the bank's principal office is located. 12 C.F.R. § 5.34 (d)(1)(i). After receiving the proposal, the Comptroller determines whether the activities would "exceed those legally permissible for a national bank's operating subsidiary." 12 C.F.R. § 5.34(d)(1)(iii); *see* App., *infra*, 43a.

[2] As this Court has pointed out, "[w]hen the statutes were revised in 1913 and re-enacted, § 92 was omitted. The revisers of the United States Code have omitted it from recent editions of the Code." *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 401 n.12 (1972).

Section 92 appeared in each edition of the United States Code until the 1952 edition. *See* 12 U.S.C. § 92 (1926); 12 U.S.C. § 92 (1928); 12 U.S.C. § 92 (1934); 12 U.S.C. § 92 (1940); 12 U.S.C. § 92 (1946). Section 92 no longer appears in the United States Code Annotated, *see* 12 U.S.C.A. § 92 (West 1989 & Supp. 1992), but it remains in the United States Code Service, *see* 12 U.S.C. § 92 (Law. Co-op. 1978 & Supp. 1992). For clarity, we cite to the statute as it appeared in the United States Code.

[3] The Comptroller first codified the regulation in 1971. *See* 36 Fed. Reg. 17,000, 17,015 (1971). The regulation stemmed from an interpretive ruling issued in 1963. *See* C.A. App. 99-100 ("C.A. App." refers to the joint appendix filed in the court of appeals).

B. The Proceedings in This Case

1. Petitioner United States National Bank of Oregon is a national bank chartered under the NBA, with its principal office in Portland, Oregon. In October 1984, petitioner submitted a "new activities" proposal to the Comptroller's Western District. Invoking the authority set forth in Section 92, petitioner sought to offer, through a subsidiary, "a full range of insurance products" from one of petitioner's branch offices located in the small town of Banks, Oregon. App., *infra*, 44a (internal quotation marks and citation omitted).

In August 1986, the Comptroller approved petitioner's proposal and thus authorized petitioner's subsidiary "to sell insurance to customers residing outside [Banks, Oregon]." App., *infra*, 47a (internal quotation marks and citation omitted). After reviewing the text, legislative record, and purposes of Section 92, the Comptroller concluded that the statute permits petitioner

> at its operating subsidiary in Banks, Oregon, to sell insurance as agent to existing and potential customers regardless of where the insurance customers are located.

C.A. App. 69; *see* App. *infra*, 47a-49a.[4]

2. In November 1986, respondents, various trade associations representing insurance agents and underwriters, filed actions against the Comptroller in the United States District Court for the District of Columbia.[5] Respondents

[4] The Comptroller, however, made clear that petitioner "could not sell insurance for a company to customers located in a state where the insurance company is not authorized to do business." C.A. App. 69; *see* App., *infra*, 49a.

[5] Petitioner intervened as an additional defendant after respondents had filed their complaints. *See* App., *infra*, 41a. The district court later consolidated the substantially similar actions. Respondents also named the United States as a defendant. The district court later granted the Comptroller's unopposed motion to dismiss

challenged the Comptroller's approval of petitioner's proposal arguing, among other things, that Section 92 must be construed as placing a geographical limit on the location of such insurance customers.[6] Respondents therefore contended that the Comptroller's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). App., *infra*, 3a.

On cross-motions for summary judgment, the district court in May 1990 upheld the Comptroller's approval of petitioner's proposal. App., *infra*, 40a-66a. Although respondents raised no claim that Section 92 was not in force, the district court pointed out that Section 92 "no longer appears in the United States Code." App., *infra*, 41a n.2. The court concluded, however, that that fact was immaterial "since Congress, other courts, and the Comptroller have presumed [the statute's] continuing validity." App., *infra*, 41a n.2 (citations omitted).

Turning to the substantive issue, the court applied the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and concluded that Section 92 "is silent with respect to geographic limitations on sale and solicitation." App., *infra*, 56a. Proceeding therefore to the second inquiry under *Chevron*, the court reviewed the Comptroller's construction of and decisions under Section 92 and held that "the Comptroller's interpretation, being rational and con-

summarily the complaints against the United States. *See* App., *infra*, 41a & n.1.

[6] Respondents also raised, but later withdrew, a claim based on the restrictions on "branch banking" set forth in 12 U.S.C. §§ 36, 81. App., *infra*, 49a n.16.

Respondents also raised claims under the Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. §§ 1841 *et seq.* The district court denied those claims, *see* App., *infra*, 63a-65a, and the court of appeals had no occasion to review them. Accordingly, those claims are not at issue before this Court.

sistent with the statute, must be upheld." App., *infra*, 63a (internal quotation marks and citations omitted). Accordingly, the court rejected respondents' challenge to the Comptroller's approval of petitioner's proposal. App., *infra*, 65a-66a.

C. The Court of Appeals Decision

In February 1992, a divided panel of the court of appeals reversed. App., *infra*, 1a-29a. Despite the fact that none of the parties had raised such a challenge, the court decided to address the question whether Section 92 remained in force.[7] The court determined that because placement of quotation marks shows that Congress originally enacted Section 92 as part of Section 5202 of the Revised Statutes, and then omitted the language of Section 92 from Section 5202 when the latter provision was amended in 1918,[8] Section 92 "has ceased to exist." App., *infra*, 17a. The court thus held that the Comptroller's "ruling [was] not in accordance with law," without reaching the substantive issue resolved below. App., *infra*, 18a.

[7] In the court of appeals, no party (including respondents) or amicus curiae challenged the validity of Section 92. In their opening brief, respondents pointed out that although Section 92 "appears to have been repealed inadvertently in 1918[,] . . . Congress, the Comptroller, and the federal courts have, however, presumed that the statute remains in effect." Resp. C.A. Br. 5 n.3. In response to the court's *sua sponte* order requesting the parties to address that issue at oral argument on March 1, 1991, respondents' counsel candidly stated at that time that although

> [i]t would quite obviously be to [respondents'] advantage if section 92 were no longer in existence, . . . we have concluded that we cannot advance a substantial argument that section 92 no longer exists.

App., *infra*, 24a. Indeed, in response to the court's second *sua sponte* order issued after oral argument that requested supplemental briefing, respondents expressly adhered to their position of accepting the validity of Section 92. *See* Resp. Supp. C.A. Br. 1-2; *see also* note 9, *infra*.

[8] *See* War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, § 20, 40 Stat. 512.

Judge Silberman dissented. App., *infra*, 23a-29a. In his view, "the majority is quite wrong in its perception of our judicial obligation." App., *infra*, 25a. As Judge Silberman explained:

> We owe no abstract duty to Congress (or the President) to enforce or not to enforce laws; all of our power derives from our constitutional duty to decide cases and controversies. The issue of section 92's validity was decidedly not part of the "case or controversy" as it was brought to the district court or on appeal to us.

App., *infra*, 25a. He therefore concluded that the court had improperly "created a controversy that did not exist." App., *infra*, 25a. Accordingly, Judge Silberman would

> affirm the district court on the ground that the Comptroller's ruling is a reasonable interpretation of section 92, and note that we do not decide the significance of Congress' actions in 1918.

App., *infra*, 29a.

The court of appeals later denied petitions for rehearing, together with suggestions for rehearing en banc. App., *infra*, 30a-39a.[9]

[9] In submitting its court-ordered response to the petitions for rehearing filed by the Comptroller and petitioner, respondents did an about-face and agreed with the court of appeals that Section 92 no longer remained in force. *See* Resp. C.A. Opp. to Pet. for Rehearing 2, 8-24; *see also* note 7, *supra*.

Judge Silberman dissented from the denial of rehearing. App., *infra*, 30a. Judge Silberman, Williams, and D.H. Ginsburg dissented from the denial of rehearing en banc, and would have limited rehearing to the issue of the court's authority to reach the question whether Section 92 remained in force. App., *infra*, 35a-37a. Judge Sentelle, joined by Judges Buckley and Henderson, filed a separate opinion concurring in the denial of rehearing en banc that took issue with Judge Silberman's dissent. App., *infra*, 33a-34a. Judge Randolph filed a separate statement. App., *infra*, 38a-39a.

REASONS FOR GRANTING THE PETITION

The court of appeals has effectively struck down an Act of Congress. In holding that Section 92 of the National Bank Act no longer remains in force, the court has ignored statutory language and overlooked pertinent aspects of the legislative record. As a result, the court's erroneous interpretation calls into question widespread and substantial national and state bank insurance activities that Section 92 has engendered over the past seventy-five years—activities previously sanctioned by other federal courts, the Congress, the Comptroller, the Board of Governors of the Federal Reserve System, and state banking authorities relying on the federal statutory provision. Such a narrowing of previously sanctioned banking activities and the Comptroller's authority in this regulatory arena calls for this Court's review.

Moreover, the court of appeals' misguided statutory analysis led it to invalidate Section 92, where other federal courts—including this Court in *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 401 & n.12 (1972)—correctly considered that provision to have remained in force. Indeed, the courts of appeals are currently in conflict over that issue. In *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), the Second Circuit flatly disagreed with the decision below and held that Section 92 remains in force. *See* 968 F.2d at 151-54. Further review by this Court is necessary to resolve this conflict among the courts of appeals over the continuing existence of Section 92.

Finally, the court of appeals here reached out to nullify Section 92 by creating a controversy of its own making. Such a practice—where the parties neither presented nor took adverse positions on the issue resolved by the court—cannot readily be squared with the role that Article III of the United States Constitution assigns to the judiciary. Given the court of appeals' invalidation of this significant and established provision of the National Bank Act, under

circumstances of the court's own making, further review by this Court is warranted.[10]

1. Since its enactment in 1916, the validity of Section 92 has been uniformly accepted by this Court, other federal courts the Congress, the Comptroller, and the Federal Reserve Board.[11] Indeed, in 1982, Congress amended an aspect of Section 92 unrelated to the insurance provision, *see* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(b), 96 Stat. 1510-11, and in 1987 imposed a one-year moratorium on the expansion of insurance activities under Section 92, *see*

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[10] The court of appeals' *sua sponte* determination of the validity of Section 92 is no impediment to this Court's review of the issue. *See, e.g., Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991).

[11] *See, e.g., Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. at 401 & n.12; *Independent Ins. Agents of America, Inc. v. Board of Governors of the Fed. Reserve System*, 736 F.2d 468, 477 (8th Cir. 1984); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 & nn.18-20 (D.C. Cir. 1979); *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261-62 & n.6 (5th Cir. 1980); *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968); *Commissioner v. W. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966); *Genessee Trustee Corp. v. Smith*, 102 F.2d 125, 127 (6th Cir. 1939); *Thompson v. Kerr*, 555 F. Supp. 1090, 1096 (S.D. Ohio 1982); *Guaranty Mortgage Co. v. Z.I.D. Assocs., Inc.*, 506 F. Supp. 101, 104 (S.D.N.Y. 1980); *Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7206 before the House Comm. on Banking and Currency*, 85th Cong., 1st Sess., pt. 1, at 280-81 (1957); *Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7206 before the House Comm. on Banking and Currency*, 85th Cong., 2d Sess., pt. 2, at 991, 1028, 1036, 1067, 1068, 1104, 1507-08 (1958); S. Doc. No. 412, 64th Cong., 1st Sess. 83-84, 136-37 (1917) (Comptroller's compilation entitled "The National Bank Act as Amended, the Federal Reserve Act, and Other Laws Relating to National Banks"); *Annual Report of the Comptroller of the Currency* 925 (1916); *Third Annual Report of the Federal Reserve Board* 135-36 (1917).

Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 583.[12]

This settled state of affairs has given rise to widespread and substantial national and state bank insurance activities across the country. The Office of the Comptroller of the Currency recently has estimated that at least 179 national banks are engaged in insurance operations under the aegis of Section 92. In addition, the Comptroller has estimated that at least 115 state-chartered banks sell insurance under state parity laws that permit such banks to engage in the same activities as national banks.[13] The decision below, however, creates considerable uncertainty over the propriety of these ongoing insurance operations, and curtails the Comptroller's authority in this regulatory arena. As such, the court of appeals' decision threatens to interfere with the orderly administration of an important aspect of our nation's banking operations.

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[12] In 1991, Congress considered—but did not enact—legislation that would have substantially amended Section 92 and curtailed national banks' insurance activities. *See* H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 1, at 81-82, 192 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 4, at 56-57, 154 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); S. Rep. No. 167, 102d Cong., 1st Sess. 170-71, 480 (1991) (describing proposed § 771 of S. 543, 102d Cong., 1st Sess. (1991)).

[13] *See* Declaration of Rosa M. Koppel, Esq., Office of the Comptroller of the Currency ¶¶ 6, 7 (Apr. 14, 1992), *The Owensboro Nat'l Bank v. Wright*, No. 91-3 (E.D. Ky.); *see, e.g.*, Ariz. Rev. Stat. Ann. § 6-184.2; Ill. Rev. Stat. ch. 17, para. 311(11); Md. Fin. Inst. Code Ann. § 5-504; N.D. Cent. Code § 6-03-38; Utah Code Ann. § 7-3-10(1).

The fact that the number of banks engaged in insurance activities comprises a relatively small percentage of the total number of national and state banks does not diminish the significance of these activities. The insurance activities at stake—as evidence by the vigorous opposition of insurance industry trade associations in this case and others—are substantial.

2. The court of appeals declared that Section 92 no longer exists—despite the settled state of affairs engendered by that provision over the past seventy-five years—by focusing on punctuation contained in the original enrolled bill. More specifically, the court of appeals invalidated Section 92 based on the placement of quotation marks in the original provision, the Act of Sept. 7, 1916, ch. 461, 39 Stat. 753. *See* App., *infra*, 7a-8a, 67a-72a. In the court's view, that punctuation reflected Congress's intention to make that provision part of Section 5202 of the Revised Statutes, which Congress amended in 1918 without including the language of Section 92 enacted in 1916. In concluding that Congress repealed Section 92 in 1918, the court of appeals ignored statutory language and overlooked pertinent aspects of the legislative record. All the available evidence—most tellingly the statutory language itself—shows that Congress enacted Section 92 as part of the Federal Reserve Act of 1913 and did not repeal Section 92 in 1918 when it amended Section 5202 by the War Finance Corporation Act.

a. This Court has recently reiterated the "cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) (citation omitted); *see, e.g., Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 26 (1988). In other words, "'[i]n ascertaining the plain meaning of [a] statute the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *McCarthy v. Bronson*, 111 S. Ct. 1737, 1740 (1991) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)); *see United States v. Monia*, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting).

A close look at the 1916 enactment confirms that Congress intended to add what became Section 92 to Section

13 of the Federal Reserve Act of 1913,[14] not Section 5202 of the Revised Statutes.[15] The paragraph of the 1916 enactment immediately preceding the reference to Section 5202 (that concerning Federal reserve bank advances to member banks (paragraph 6)), and the paragraph of the 1916 enactment immediately preceding the reference to the Section 92 provision (that concerning Federal reserve bank rediscounts of bills and acceptances (paragraph 8)), each expressly refers to "this Act," *i.e.*, the Federal Reserve Act. *See* App., *infra*, 69a-70a. The fact that the second and third paragraphs of Section 13 of the Federal Reserve Act grant the banks such discount and rediscount authority further confirms that "this Act" refers to the Federal Reserve Act. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752; App., *infra*, 68a-69a.

By contrast, the Section 5202 reference in the 1916 enactment (paragraph 7)—which appears before the paragraph containing what became Section 92 (paragraph 9)—concludes with a cross-reference to "the Federal reserve Act" This specific reference thereby demonstrates that the paragraph identified as "Fifth" marks the end of the Section 5202 reference. See App., *infra*, 70a. Moreover, the 1916 enactment's addition of a paragraph entitled "Fifth" to the existing four paragraphs of Section 5202 supports this common sense construction of the statute. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753; App., *infra*, 70a.

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[14] *See* Pub. L. No. 63-43, § 13, 38 Stat. 263-64 (1913); App., *infra*, 77a-80a.

[15] Section 5202 of the Revised Statutes, originally enacted as part of the National Banking Act, *see* Act of Feb. 25, 1863, ch. 58, § 42, 12 Stat. 677; Act of June 3, 1864, ch. 106, § 36, 13 Stat. 110, dealt exclusively with limits on the indebtedness of national banks. *See* App., *infra*, 77a.

In other words, the "language of the statute itself" [16] shows that Congress intended that each of the paragraphs following the Section 5202 reference—including Section 92—would become part of the Federal Reserve Act.[17] Accordingly, Congress's amending Section 5202 in 1918 without mentioning the language of Section 92 did not effect a repeal of the latter; Congress had no intention of placing Section 92 within Section 5202 in the first instance.[18]

b. This straightforward construction of the statute, as described above, reveals the court of appeals' error in placing undue weight on the placement of punctuation. This Court has instructed lower courts, when construing statutes, to "disregard the punctuation, or . . . repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83

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[16] *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

[17] If, however, Congress had sought to incorporate Section 5202 into the Federal Reserve Act, it presumably would have referred to "this Act" as opposed to referring explicitly to "the Federal reserve Act."

[18] The title of the 1916 enactment, "An Act To amend certain sections of the Act entitled 'Federal reserve act,' approved December twenty-third, nineteen hundred and thirteen," 39 Stat. 752; App., *infra*, 67a, further shows that Congress placed Section 92 within Section 13 of the Federal Reserve Act, not within Section 5202 of the Revised Statutes. In order to amend Section 13 in 1916, Congress restated that provision of the Federal Reserve Act in its entirety. In so doing, the 1916 Act restated verbatim a portion of the 1913 Act that referred to amending Section 5202, but the 1916 Act did not change that 1913 amendment. *See* 38 Stat. 264; 39 Stat. 752-53; App., *infra*, 70a, 79a-80a. In other words, Congress was not amending Section 5202 in 1916, and the title of the 1916 enactment describes precisely what Congress sought to accomplish. *Compare Brotherhood of R.R. Trainmen v. Baltimore & O.R.R.*, 331 U.S. 519, 528 (1947) ("That the heading of [a statute] fails to refer to all the matters which the framers of that [statute] wrote into text is not an unusual fact.").

(1932); *see Crawford v. Burke*, 195 U.S. 176, 192 (1904) ("So little is punctuation a part of statutes that courts will read them with such stops as will give effect to the whole."); *Ewing v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837) ("[p]unctuation is a most fallible standard by which to interpret a writing"); *cf. Taylor v. United States*, 495 U.S. 575, 581-99 (1990) (Congress intended to retain the statutory definition of "burglary" despite repealing the pertinent definitional provision). The placement of the punctuation in the final printed version of the 1916 enactment—setting off each paragraph after paragraph 6 as part of Section 5202, *see* App., *infra*, 70a-73a—should not serve to effect an unintended repeal. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 549 (1974); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). As this Court has long made plain, "[t]he cardinal rule is that repeals by implication are not favored." *Posados v. National City Bank*, 296 U.S. 497, 503 (1936).

Moreover, the available legislative record confirms what is apparent from the face of the 1916 enactment—that Congress placed Section 92 in Section 13 of the Federal Reserve Act, not in Section 5202 of the Revised Statutes. The bill that became the 1916 enactment, H.R. 13391, as passed by the Senate in July 1916, contained no potentially confusing quotation marks in the section amending Section 13 of the Federal Reserve Act, which included Section 92. *See* H.R. 13391, as amended by the Senate, 64th Cong., 1st Sess. § 13 (1916). Indeed, the Senate had adopted a specific amendment to delete quotation marks from the bill. *See* 53 Cong. Rec. 11,155 (1916). It was thus clear that the reference to Section 5202 of the Revised Statutes concluded with the paragraph identified as "Fifth," thus placing Section 92 squarely within the Federal Reserve Act.

The bill then proceeded to the Conference Committee. The Committee's final working version of the section amending Section 13 of the Federal Reserve Act was

printed without quotation marks in section 13. *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916). The Committee's final marked-up version, however, was changed. This version, to which the House agreed in late August 1916, contained handwritten quotation marks only at the beginning of each paragraph; the version to which the Senate agreed, however, did not contain quotation marks.[19] The House marked-up version, which was apparently slated to be printed as the final bill, and the Senate version, again each ensured that Section 92 would be placed within the Federal Reserve Act, not within Section 5202 of the Revised Statutes.

It was only in the versions reprinted in House and Senate records—after the Conference Committee's final marked-up version had been approved—that the inadvertent quotation marks appeared, thus sowing the confusion that led the court of appeals astray.[20] This clerical insertion, or error, in view of the context outlined above, may not change the substance of Congress's intended enactment. *See Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917) ("The presence or absence of a comma, according to the whim of the printer or proof

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[19] *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (House mark-up); H.R. Res., 64th Cong., 1st Sess. (1916) (agreeing to H.R. Conf. Rep. No. 1175); S. Res., 64th Cong., 1st Sess. (1916) (agreeing to H.R. Conf. Rep. No. 1175).

The Senate's marked-up version of the Conference Committee report, H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (Senate mark-up), and the Senate's printed final version of that report, *see* S. Doc. No. 533, 64th Cong., 1st Sess. (1916), each contained no potentially confusing quotation marks in the section amending Section 13 of the Federal Reserve Act. The House of Representative's printed final version of the Conference Committee report also contained no such punctuation. *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (House final printed version).

[20] *See Journal of the House of Representatives* 994-95 (1916); 53 Cong. Rec. 13,258-59, 13,354-55 (1916).

reader, is so nearly fortuitous that it is a wholly unsafe aid to statutory construction.").[21]

c. Indeed, the court of appeals' emphasis on the placement of punctuation led it to ignore "concrete evidence . . . that the 65th Congress [did not understand] section 92 to be part of section 5202." App., *infra*, 11a-12a; *see Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2482 n.4 (1991). Both the Comptroller and the Federal Reserve Board, in compilations of pertinent banking statutes submitted to Congress in 1917, each set forth Section 92 as part of the Federal Reserve Act.[22] The year before, the Comptroller in its Annual Report had also expressed the same view. *See Annual Report of the Comptroller of the Currency* 925 (1916). These materials thus help to explain Congress's omitting any reference to the language of Section 92 when it amended Section 5202 in 1918. *See* War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, § 20, 40 Stat. 512 (permitting national banks to incur liabilities under the 1918 Act without regard to the debt limits set by Section 5202).[23]

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[21] The pertinent statutory language and legislative record thus effectively rebut whatever presumption may arise from the omission of Section 92 from the more recent versions of the United States Code. *See* 1 U.S.C. §§ 112, 204(a); *United States v. Bergh*, 352 U.S. 40, 47 (1956).

[22] *See* S. Doc. No. 412, 64th Cong., 1st Sess. 83-84, 136-37 (1917) (Comptroller's compilation entitled "The National Bank Act as Amended, the Federal Reserve Act, and Other Laws Relating to National Banks") (Perhaps as a matter of caution, the Comptroller also set forth Section 92 as part of the Revised Statutes.); *Third Annual Report of the Federal Reserve Board* 135-36 (1917). Accordingly, the court below erred in assuming that "there were only three sources to which [the 65th Congress] could turn for up-to-date information: the Statutes at Large, . . . or either of two privately published services." App., *infra*, 11a.

[23] It is thus understandable that Congress made no mention of Section 92 during its consideration of the 1918 Act. *See* H.R. Rep. No. 448, 65th Cong., 2d Sess. (1918); 56 Cong. Rec. 2777-805, 2847-61, 2913-27, 3039-53, 3081-109, 3130-51, 3293-96, 3605-32, 3659-87, 3779-812, 3843-45, 4373-79, 4452-63 (1918).

As the Second Circuit has determined, there is no reason to infer that Congress, by enacting the War Finance Corporation Act of 1918, had any intention of repealing the national bank insurance authority it had adopted two years before. *See American Land Title Ass'n v. Clarke*, 968 F.2d 150, 151-54 (2d Cir. 1992).

Any reference would have been beside the point: according to Congress's contemporaneous understanding, Section 92 remained as part of the Federal Reserve Act, as amended in 1916 by the Act of Sept. 7, 1916, ch. 461, 39 Stat. 753.

3. The court of appeals' truncated statutory analysis led it to invalidate Section 92, where other federal courts —including this Court in *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 401 & n.12 (1972)— correctly considered that provision to have remained in force. *See* note 12, *supra*. For example, the Fifth Circuit, after noting the United States Code's omission of Section 92 in 1952, as well as the various federal decisions such as *First Security Bank* that address the issue, expressly concluded that "further discussion of the issue [concerning Section 92's validity] seems moot." *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1262 n.6 (5th Cir. 1980); *see Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968).

More significantly, the decision below conflicts squarely with a recent decision of the Second Circuit. In *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992), the Second Circuit—in response to the issuance of the decision below—*sua sponte* addressed the issue of the validity of Section 92 and expressly held that Section 92 remains in force. *See* 968 F.2d at 151-54. After reviewing the language, purposes, and legislative history of the War Finance Corporation Act of 1918, the Second Circuit concluded that "Congress did not intend to alter the insurance agency powers of national banks [previously

enacted in Section 92]." 968 F.2d at 154.[24] Accordingly, the court held that the 1918 Act did "not effect a repeal of 12 U.S.C. § 92." 968 F.2d at 154.[25]

4. Finally, the court of appeals should not have even had the opportunity to err. As another court has succinctly stated:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.

Carducci v. Regan, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (quoted in App., *infra*, 25a-26a (Silberman, J., dissenting)). Moreover, this Court has long made clear that Congress has not conferred—and may not confer—"jurisdiction on Art. III federal courts to render advisory opinions, . . . because suits of this character are inconsistent with the judicial function under Art. III." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citations omitted); *see, e.g., Muskrat v. United States*, 219 U.S. 346 (1911). As this Court has instructed, a prohibited advisory opinion is "an abstract determination by the Court of the validity of a statute . . . or a decision

[24] In *American Land Title Ass'n v. Clarke*, the Second Circuit apparently assumed—without further analysis—that Congress enacted Section 92 as part of Section 5202 of the Revised Statutes, not as part of Section 13 of the Federal Reserve Act. *See* 968 F.2d at 151-52. As we have explained, that assumption is erroneous.

More recently, in *The Owensboro Nat'l Bank v. Wright*, No. 91-3 (E.D. Ky. Aug. 4, 1992), the district court adopted the Second Circuit's rationale and thus held that "section 92 remains valid law." Slip op. 16 (internal quotation marks and citation omitted).

[25] The Second Circuit proceeded to the substantive question presented and concluded, contrary to the Comptroller's construction and application of the statute, that "section 92 prohibits national banks located and doing business in places with over 5,000 inhabitants from engaging in the title insurance agency business." *American Land Title Ass'n v. Clarke*, 968 F.2d at 157.

advising what the law would be on a hypothetical state of facts." *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 262 (1933) (citations omitted).

Here, it is plain that the court of appeals reached out to nullify Section 92 by creating a controversy of its own making. *See* note 7, *supra*. Despite the court's repeated invitation, no party contended that Congress had repealed Section 92 in 1918. As this Court has cautioned, federal courts should not strive to resolve issues that the parties have not properly presented where, as here, the issue concerns the validity of an Act of Congress. *See Williams v. Zbaraz*, 448 U.S. 358, 367 (1980) (district court exceeded its jurisdiction by invalidating federal statute where parties had not challenged it). Indeed, that prohibition applies with particular force in this case, because federal courts "do not sit . . . to give advisory opinions about issues as to which there are not adverse parties before [the courts]." *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (*per curiam*).

This case does not involve circumstances that would warrant a departure from these settled principles. Proper resolution of the Section 92 issue is not beyond any doubt. *See, e.g., Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) (*per curiam*). As the court of appeals itself acknowledged, the statutory analysis confirming Section 92's validity is "plausible." App. *infra*, 17a. Indeed, the continuing validity of Section 92 had understandably remained unchallenged in—and had even been ratified by—the reported case law.[26] Nor is this a case

[26] *See also United States v. Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring in the judgment) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one. . . . Even so, there must be enough play in the joints that the Supreme Court need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it—particularly when the judgment

where "injustice might otherwise result" if the Section 92 issue had not been determined. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). And there is no suggestion that this case involves the sort of collusive "stipulation[] as to matters of law" that courts may disregard. *See* App., *infra*, 33a (Sentelle, J., concurring in the denial of rehearing *en banc*); *cf. Estate of Sanford v. Commissioner*, 308 U.S. 39, 51 (1939) ("We are not bound to accept, as controlling, stipulations as to questions of law.").

The consequences of the court of appeals' casting aside these jurisdictional principles are substantial. As Judge Silberman stated:

> Injustice is more likely to result from our reaching the issue [of the validity of Section 92] than from our declining to do so, because [that] question . . . affects many entities, including members of the insurance and banking industries who have relied on the law's continued existence and who, having no notice that the question might be decided, had no opportunity to make their views known in this case.

App., *infra*, 29a (dissenting opinion); *see also Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (declining to resolve issue where party "has never been heard in any way on the merits").

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will reinforce error already prevalent in the system.") (citation omitted)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 1, 1991 Decided February 7, 1992
As Amended February 25, 1992

No. 90-5209

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Appellants

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY, *et al.*

No. 90-5214

NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, *et al.*,
Appellants

v.

ROBERT L. CLARKE, *et al.*

Appeals from the United States District Court
for the District of Columbia Circuit

(D.C. Civ. Nos. 86-3042 & 86-3045)

Before SILBERMAN, BUCKLEY, and HENDERSON, *Circuit Judges*.

BUCKLEY, Circuit Judge:

Appellants challenge a ruling by the Comptroller of the Currency that would permit any national bank, or its branch, located in a community of not more than five thousand inhabitants to sell insurance to customers outside that community. The Comptroller based his ruling on section 92 of the National Bank Act. As we find *sua sponte* that that section has been repealed, and as the Comptroller cites no alternative authority for his ruling, we reverse.

I. Background

Section 92 was enacted in 1916 as an amendment to section 5202 of the Revised Statutes of the United States. It provided, in relevant part, that any national bank

> located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any . . . insurance company authorized by the authorities of the State in which said bank is located to do business in said State.

39 Stat. 750, 753 (1916). This provision was codified as section 92 of Title 12 of the United States Code. Although section 92 was omitted from section 5202 when the latter was revised and reenacted in 1918, and although the section has been omitted from recent editions of the United States Code, the Comptroller has continued to treat it as valid. *See, e.g.*, 12 C.F.R. § 7.7100 (1991).

The appellant trade associations, which represent insurance agents and underwriters, challenge a ruling by the Comptroller that is based on section 92. The ruling holds that under that statute, "a national bank or its

branch which is located in a place of 5,000 or under population may sell insurance to existing and potential customers located anywhere." Letter from Judith A. Walter, Senior Deputy Comptroller for National Operations, to Mr. T. Dalrymple (Aug. 18, 1986), *reprinted in* Joint Appendix at 65. Appellants assert that section 92 places a geographical limit on such sales; and they brought this action to have the ruling set aside under the APA as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A) (1988), as a national bank is not permitted to engage in any activity that is not specifically authorized by law. *See* 12 U.S.C. § 24 (1988).

The district court granted the Comptroller's motion for summary judgment based on its finding that his interpretation of section 92 was "rational and consistent with the statute." *National Ass'n of Life Underwriters v. Clarke*, 736 F.Supp. 1162, 1173 (D.D.C.1990) (internal quotation marks omitted). Although the court noted "that [section 92] no longer appears in the United States Code," it stated that it would "assume that the statute exists *in propria vigore*" because "Congress, other courts, and the Comptroller have presumed its continuing validity." *Id.* at 1163 n. 2 (citations omitted). The court cited no other source of authority for the Comptroller's ruling; nor does the Comptroller claim any.

After the parties had submitted their appellate briefs, we asked them to address two questions: First, should this court decide the validity of section 92 in the absence of a challenge to that validity by any of the parties? Second, was section 92 in fact valid? In response to the first question, appellants took the position that this court was required to consider the validity of section 92 as it "would be without constitutional authority or power to render [a decision on the merits] if Section 92 [did] not exist." Supplemental Biref for Appellants at 3. The Comptroller, on the other hand, argued that it would be

inappropriate for the court to address the issue: It had not been raised by the parties; and, in any event, "the legal issue identified by the Court [did] not go to its jurisdiction, but rather to the merits of plaintiffs' claims." Supplemental Brief for Federal Appellees at 5.

In responding to our second question, the parties agreed that section 92 remains in effect. They argue that Congress did not intend to repeal section 92. Its technical deletion, they claim, was the result of misplaced quotation marks and therefore should be ignored; moreover, as section 92 was unrelated to the purposes of the 1918 revision of section 5202, an intention to repeal it should not be imputed to Congress. Finally, the parties claim that subsequent action by Congress, the Comptroller, and the federal courts (including the Supreme Court) confirms that section 92 remains in effect.

For the reasons set forth below, we conclude that we must decide whether section 92 continues to have the force of law; and because we find it does not, we reverse.

II. Discussion

A. Should the court decide section 92's validity?

The role of the judicial branch is a limited one.

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.

Carducci v. Regan, 714 F.2d 171, 177 (D.C.Cir.1983) (Scalia, J.). On occasion, however, a court will find it necessary to go beyond the specific legal theories advanced by the parties. In *Arcadia, Ohio v. Ohio Power Co.*, —— U.S. ——, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990), for example, the parties agreed that the case

depended on the proper application of section 318 of the Federal Power Act. The Supreme Court concluded, however, that the challenged orders did not fall within the scope of that section, and it disposed of the case on another basis. *Id.* at 111 S.Ct. at 418. *See also Kamen v. Kemper Financial Services, Inc.*, —— U.S. ——, 111 S.Ct. 1711, 1718, 114 L.Ed.2d 152 (1991) ("court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law"). Moreover, federal courts "are not bound to accept, as controlling, stipulations as to questions of law." *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51, 60 S.Ct. 51, 59, 84 L.Ed. 20 (1939); *see also Sebold v. Sebold*, 444 F.2d 864, 870 n. 8 (D.C.Cir. 1971) ("Since this is a question of law, . . . the agreement of counsel is not binding on this court."). The Supreme Court has also held that a court must take judicial notice of a state law that is invalid, stating that "on general principles, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States." *Town of South Ottawa v. Perkins*, 94 U.S. 260, 268, 24 L.Ed. 154 (1876).

We believe that this is one of those occasions where a court may properly dispose of a case on a basis not advanced by the parties. Here, the legal question we are asked to decide is the geographical reach of section 92. We are on notice, however, that the section no longer appears in the United States Code. That fact gives rise to a statutory presumption that the law invoked by the parties is invalid, *see* 1 U.S.C. § 204(a) (1988), a presumption that the parties have been given ample opportunity to rebut. Because this controversy hangs on the interpretation of a statute that is presumed not to exist, we not only have the right to inquire into its validity, we have the duty to do so.

B. Is section 92 valid?

Section 204(a) of Title 1 of the United States Code states:

> The matter set forth in the edition of the Code of Laws of the United States current at any time shall . . . establish prima facie the laws of the United States, general and permanent in their nature.

Therefore, in order to determine whether section 92 is valid, we first consult the Code. On inspecting 12 U.S.C. § 92 (1988), we find the following:

> **§ 92. Omitted**
>
> Codification
>
> The provisions of this section, which authorized national banking associations in any place where the population did not exceed 5,000 to act as an insurance agent or real estate broker, were added to R.S. § 5202 by act Sept. 7, 1916, were omitted in the amendment of R.S. § 5202 by act Apr. 5, 1918, and therefore this section was omitted from the Code. Pub.L. 97-320, Oct. 15, 1982, purported to amend the Act of September 7, 1916 by deleting [two provisions]. R.S. § 5202, as amended, was set out as section 82 of this title prior to repeal by Pub.L. 97-320.

12 U.S.C. § 92 (1988) (citations omitted). In sum, the codifiers treat section 92 as having been repealed in 1918.

Because we must look to the Code for *prima facie* evidence of federal law, its omission creates a presumption that section 92 does not exist. Still, other evidence may rebut that presumption; " 'the very meaning of "prima facie" is that the Code cannot prevail over the Statutes at Large when the two are inconsistent.' " *United States v. Welden*, 377 U.S. 95, 98 n. 4, 84 S.Ct. 1082,

1085 n. 4, 12 L.Ed.2d 152 (1964) (quoting *Stephan v. United States*, 319 U.S. 423, 426, 63 S.Ct. 1135, 1136, 87 L.Ed. 1490 (1943) (per curiam)). We must therefore examine the text of the Statutes at Large to see whether they rebut the presumption that section 92 has been repealed.

1. *The Statutes at Large*

The critical statutes are section 13 of the Federal Reserve Act of 1913, Pub.L. No. 63-43, § 13, 38 Stat. 251, 263-64 (1913) ("1913 Act"), the 1916 amendments to that Act, Pub.L. No. 64-270, 9 Stat. 752, 753 (1916) ("1916 amendments"), and section 20 of the War Finance Corporation Act of 1918, Pub.L. No. 65-121, § 20, 40 Stat. 506, 512 (1918) ("1918 Act"). The relevant provisions of these statutes will be found in appendices, A, B, and C to this opinion.

As will be seen in Appendix A, section 5202 of the Revised Statutes of the United States, as amended by the 1913 Act, is to be found in the text of section 13 of that Act. The question raised by the parties is whether Congress, in 1916, intended to make the new section 92 a part of section 5202. The critical language in the 1916 amendments reads as follows:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding. . . .
>
> * * * *
>
> "That in addition to the powers now vested by law in national banking associations . . . located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance

company . . . by soliciting and selling insurance and collecting premiums on policies issued by such company. . . . *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

"Any member bank may accept drafts or bills of exchange drawn upon it. . . . *Provided further*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

The middle paragraph above would later be codified as 12 U.S.C. § 92. Thus, on its face, the 1916 amendments had the effect of placing section 92 within section 5202 of the Revised Statutes.

Two years later, Congress enacted the 1918 Act. Section 20 of that Act reads in part as follows:

Sec. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"Sec. 5202. No national banking association shall at any time . . . except on account of demands of the nature following:

"First. Notes of circulation.

* * * *

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

Section 20, in short, sets forth between opening and closing quotation marks what appears as the entire text of the revised section 5202; and as a glance at Appendix C will confirm, the language of section 92 is not to be found in section 5202 as amended.

Under traditional rules of statutory construction, the meaning of section 92's omission is plain; material

omitted on reenactment is deemed repealed. *See, e.g., Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 373, 25 S.Ct. 443, 449, 49 L.Ed. 790 (1905) ("[I]t cannot in reason be said that the omission . . . gives rise to the implication that it was the intention of Congress to reenact it."); 1A N. Singer, Sutherland Statutory Construction § 23.12, at 355 (4th rev. ed. 1985) ("When the amendatory act purports to set out the original act or section as amended . . . all matter that is omitted in the act or section which the amendment purports to set out as amended, is considered repealed.") (footnotes omitted). Thus the language and punctuation of the Statutes at Large, traditionally construed, support the codifier's conclusion that section 92 was repealed by the 1918 Act.

2. *Did Congress Intend to Repeal Section 92?*

The parties do not dispute the fact that section 92 cannot survive a literal reading of the 1916 and 1918 statutes. They argue, instead, that the section remains valid because Congress did not intend to repeal it. They make their statutory argument in two stages: First, they contend that the apparent deletion was the result of misplaced quotation marks in the 1916 amendments that had the effect of placing section 92 within section 5202 of the Revised Statutes instead of making it part of section 13 of the Federal Reserve Act. They then reason that as section 5202 as amended was not intended to include section 92, its omission from the subsequent revision of section 5202 should not effect a repeal.

They assert, specifically, that a quotation mark should not have appeared at the end of the paragraph marked [1] in Appendix B, and that the quotation mark now appearing after the first colon in paragraph [2] should have been placed at the beginning of that paragraph. Had section 20 been so punctuated, they say, it would be clear that section 5202 itself had not been amended to

include the textually unrelated paragraphs marked [3], [4] (section 92), and [5]. Because a change of these quotation marks would make for greater textual consistency in the 1916 amendments, the parties argue that a mistake was made in the printing of the bill, and they cite cases in which courts have adjusted the punctuation of statutes in order to make sense of them. They conclude that the 1918 Act's revision of section 5202 did not delete section 92 because the latter could not properly be considered part of the former.

In support of their view of the 1916 amendments and their interaction with the 1918 Act, the parties direct our attention to a letter and memoranda submitted to the House Banking Committee in 1958 that also conclude that the inclusion of section 92 in section 5202 of the Revised Statutes was inadvertent, and that section 92 was therefore never repealed. *See Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7026 Before the Comm. on Banking and Currency of the House of Representatives*, 85th Cong., 2d Sess. 1035, 1036 (1958) ("1958 Hearings") (letter from Comptroller asserting that Congress misplaced quotation marks and that section 92 "remain[s] in full force"); *id.* at 1036-40 (memorandum from Federal Reserve Board reaching same conclusion); *id.* at 1063-65 (Library of Congress's Legislative Reference Service reaching same conclusion); *id.* at 1065-71 (general counsel of Banking Committee reaching same conclusion).

This is an impressive array of witnesses, but the verdict is not unanimous. Committee member (and future chairman) Wright Patman was of the view that section 92 did not exist. *Id.* at 1062 (section 92 "was repealed in 1918"). Seven years later, the staff of a House Banking subcommittee, after examining the response of the Comptroller to a series of questions, would conclude that

> [w]hether or not the Congress . . . [intended] to perpetuate 12 U.S.C. 92, cannot be ascertained. In any event, however, its intentions would not suffice to overcome the effect of the deletion of § 92 by the inclusion of § 20 in the Act of 1918. . . . Section 92 is non-existent.

Consolidation of Bank Examining and Supervisory Functions, 1965: Hearings on H.R. 107 and H.R. 6885 before the Comm. on Banking and Currency of the House of Representatives, Subcomm. on Bank Supervision and Insurance, 89th Cong., 1st Sess. 3, 391 (1965) ("1965 Hearings").

It seems to us that the subcommittee staff had its eyes on the right question; namely, on the effect of the 1918 Act. Whatever the intentions of the 64th Congress in 1916, they are essentially irrelevant to the task at hand. What we are called upon to determine are the consequences of the action taken by the 65th Congress when, two years later, it voted the 1918 Act into law. Section 20 of that Act, which amended section 5202, originated as a floor amendment that was adopted without debate. *See* 1965 Hearings at 391. It seems fair to assume that in drafting section 20 and in voting to enact it, the author and interested members of the House and Senate would have sought out a current text of section 5202 to work from, and not relied on institutional memories of what the text was, or should have been.

At that time, there were only three sources to which they could turn for up-to-date information: the Statutes at Large, which reproduced section 5202's facially unambiguous language, or either of two privately published services. Each of these services reported that as a result of the 1916 amendmnets, section 5202 of the Revised Statutes contained the provisions to be found in the paragraphs marked [2] though [5] of Appendix B. *See* 9 U.S.Comp.Stat.Ann. § 9764 (West 1916) and 3 U.S.Stat.Ann. § 5202 (T.H. Flood & Co. 1916). Absent concrete evidence to the contrary, we must assume that the 65th Congress understood section 92 to be part of

section 5202, and that its exclusion from the amended section 5202 signaled its repeal.

The Comptroller argues, however, that as the purpose of the War Finance Corporation Act of 1918 was to assist the financing of the war effort, a purpose that had no logical relationship to the insurance activities of small town banks, the traditional rule governing provisions omitted in the version of a statute should not be applied to this case. In support of this position, the Comptroller cites two cases interpreting the Clayton Finality Act of 1959, 73 Stat. 243 (1959), *F.T.C. v. Jantzen, Inc.*, 386 U.S. 228, 87 S.Ct. 998, 18 L.Ed.2d 11 (1967), and *F.T.C. v. Standard Motor Products, Inc.*, 371 F.2d 613 (2d Cir. 1967), which conclude that "the rule that amendment 'to read as follows' repeals everything omitted . . . must yield where [its] application would be inconsistent with the purposes of the statute." *Standard Motor*, 371 F.2d at 617.

The inconsistency found in those two cases was one where the literal application of a statutory phrase in the Clayton Finality Act would have frustrated a clearly stated purpose of the amendment. Here, however, there is no inherent contradiction between the deletion of section 92 and facilitating the financing of the American war effort. The two are simply unrelated, and no one argues that the stated purpose of the 1918 Act would have been impeded by the section's repeal.

The Comptroller refers us to cases indicating that we have the authority to rectify Congress's apparent error: When "a mistake in draftsmanship is obvious, courts may remedy the mistake," *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 242 (D.C.Cir.1981); in construing a statute, a court "will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83, 53 S.Ct. 42, 43-44, 77 L.Ed.

175 (1932). *See also Hammock v. Loan and Trust Co.*, 105 U.S. 77, 84-85, 26 L.Ed. 1111 (1881) (same). In each of these cases, the error distorted the meaning of a statute; where the putative error brings about the repeal of a statute, however, judicial correction entails a far graver task—a task that has generally been shouldered by the legislative branch. *See, e.g., Whitney v. State Tax Comm'n*, 309 U.S. 530, 535-37, 60 S.Ct. 635, 637-38, 84 L.Ed. 909 (1940) (New York legislature altered trust law and inadvertently immunized certain trusts from taxation; gap corrected by statute); *United States v. Riker*, 670 F.2d 987, 988 (11th Cir.1982) (Congress inadvertently repealed statute prohibiting possession of drugs aboard American ships at sea; gap corrected by statute).

3. *Subsequent treatment by Congress, the Comptroller, and the courts*

The parties argue, finally, that the subsequent treatment of section 92 by legislative, administrative, and judicial officials requires us to find that the provision is alive and well. First, they note that Congress in 1982 attempted to delete several provisions from section 92. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub.L. No. 97-320, § 403(b), 96 Stat. 1469, 1510-11 (1982); *see also* S.Rep. No. 536, 97th Cong., 2d Sess. 60 (1982), *reprinted in* 1982 U.S.Code Cong. & Admin. News 3054, 3114 (section 403(b) is "a conforming amendment to 12 U.S.C. § 92, which deletes *existing* reference to the authority of national banks.") (emphasis added). Moreover, at the time the parties filed their supplemental briefs, Congress was considering legislation that, *inter alia*, would repeal section 92. *See* H.R. 6, 102nd Cong., 1st Sess. § 432 (1991). The parties contend that Congress would hardly seek to modify or repeal a statute that no longer existed.

What Congress may now believe, however, is irrelevant. "[I]t is well settled that the views of a subsequent Con-

gress form a hazardous basis for inferring the intent of an earlier one." *Russello v. United States*, 464 U.S. 16, 26, 104 S.Ct. 296, 302, 78 L.Ed.2d 17 (1983) (internal quotation marks omitted). Section 92 was either repealed in 1918 or it was not; and for those same reasons, it is also immaterial that the Comptroller of the Currency has continued to treat the section as valid. Federal agencies have no authority to reinstate a statute that Congress has repealed.

In one of the cases cited by the parties has a court found that section 92 remains valid; rather, they have presumed that it does. *See, e.g., Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 & nn. 18-20 (D.C.Cir.1979); *Independent Ins. Agents of America, Inc. v. Board of Governors of Fed. Reserve System*, 736 F.2d 468, 477 (8th Cir. 1984); *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261 n. 6 (5th Cir. 1980).

While the Supreme Court made a number of references to section 92 in *Commissioner v. First Security Bank of Utah, N.A.*, 405 U.S. 394, 92 S.Ct. 1085, 31 L.Ed.2d 318 (1972), its decision did not depend on the statute's continued vitality. That case concerned section 482 of the Internal Revenue Act ("IRA"), which, for tax purposes, allows the Commissioner to reallocate income among companies that are under common ownership or control. *See* 26 U.S.C. § 482 (1988). Two national banks, presumably located in communities having in excess of five thousand inhabitants, referred borrowers electing to purchase credit life insurance to an independent insurance company that, in turn, would reinsure the policies with an insurance subsidiary of the holding company that owned the banks. The banks generating the credit life insurance received no compensation for their services; in fact, they had been advised by counsel that it would be unlawul for them to received any income as a result of their customers' purchase of the insurance. 405 U.S. at 397, 92 S.Ct. at 1088. Nevertheless, the Commissioner of Internal Revenue used his authority under section 482 of the IRA to reallocate forty percent of the insurance subsidiary's premium income to the banks as compensation for originating the credit.

The Supreme Court described the question before it as "whether there was a shifting or distorting of the Banks' true net income resulting from the receipt and retention by [insurance subsidiary] of the premiums above described." *Id.* at 400-01, 92 S.Ct. at 1089-90. The Court noted that

> the Banks could never have received a share of these premiums. National banks are authorized to act as insurance agents when located in places having a population not exceeding 5,000 inhabitants, 12 U.S.C.A. § 92.12 [12]

[12] Section 92 of the National Bank Act was enacted in 1916. When the statutes were revised in 1918 and re-enacted, § 92 was omitted. The revisers of the United States Code have omitted it from recent editions of the Code. However, the Comptroller of the Currency considers § 92 to be effective and he still incorporates the provisions in his Regulations, 12 CFR §§ 2.1-2.5 (1971).

Id. at 400 and n. 12, 92 S.Ct. at 1090 & n. 12. The Court then observed:

> Although § 92 does not explicitly prohibit banks in places with a population of over 5,000 from acting as insurance agents, courts have held that it does so by implication.
>
> The Comptroller of the Currency has acquiesced in this holding, and the Court of Appeals for the Tenth Circuit expressed its agreement in the opinion below.
>
> • • • •
>
> [The Commissioner] does not contest this finding by the Tax Court or the holding in this respect of the Court of Appeals below. *Accordingly, we assume*

for purposes of this decision that the Banks were prohibited from receiving insurance-related income.

. . .

Id. at 401-02, 92 S.Ct. at 1090-91 (emphasis added) (footnote omitted).

Based on this assumption, the Court concluded that because the banks did not in fact receive any premium income, and because they would have been precluded from receiving such income whether or not they were under common control with the insurance subsidiary, "the premium income received by [the insurance subsidiary] could not be attributable to the Banks"; the "Commissioner's exercise of his § 482 authority was therefore unwarranted." *Id.* at 407, 92 S.Ct. at 1093.

While it is true, as Justice Blackmun noted in dissent, that the Court had placed "repetitive emphasis on the missing § 92," *id.* at 419, 92 S.Ct. at 1099, its reliance was based on an explicit assumption that the statute prohibited insurance sales by a national bank located in a community with a population of more than five thousand. This assumption as to the application, we believe, extended to the validity of the section. Although the Court had earlier referred to section 92 as authorizing national banks to act as insurance agents in places having no more than five thousand inhabitants, *id.* at 401, 92 S.Ct. at 1090, that reference was qualified by footnote 12, which called attention to section 92's omission from recent editions of the United States Code.

Thus, the Supreme Court never directly addressed the question before us today. A determination of the validity of section 92 was not necessary to its decision in *First Security Bank*; and while the footnote observed that the Comptroller still considered the section to be effective, this does not indicate that the Court adopted such a view.

III. Conclusion

We acknowledge that the parties' analysis of the 1916 amendments is plausible, and that the placement of section 92 in section 5202 of the Revised Statutes might well have been a mistake. Their claim that we must therefore find section 92 valid, however, runs up against the stubborn fact that the troublesome quotation marks are located where they are, not where the parties argue that the 64th Congress intended them to be. Like it or not, they are an integral part of the bill that the President signed into law and that was enrolled in the Statutes at Large. In adopting section 20 of the 1918 Act, the 65th Congress amended section 5202 as it appeared in those Statutes; and as the parties have failed to point to any any concrete evidence to the contrary, we must conclude that Congress intended the consequences of its actions, and that section 92 has ceased to exist.

Moreover, even if we were persuaded that its repeal was in fact the result of cumulative mistakes by both Congresses (the misplacement of quotation marks in 1916 and the failure to take corrective action in 1918), we would still be hesitant to move into the breach. We recognize that, in order to give effect to a clear congressional intent, federal courts have assumed a rather broad responsibility for correcting flaws in the language and punctuation of federal statutes. There is a point, however, beyond which a court cannot go without trespassing on the exclusive prerogatives of the legislative branch.

We believe we are at that point. It is one thing for a court to bend statutory language to make it achieve a clearly stated congressional purpose; it is quite another for a court to reinstate a law that, intentionally or unintentionally, Congress has stricken from the statute books. If the deletion of section 92 was a mistake, it is one for Congress to correct, not the courts.

As section 24 of the National Bank Act limits a national bank's activities to those authorized by law, and as the Comptroller cites no authority other than that section for its challenged ruling, we find that ruling not in accordance with law. We therefore reverse and remand the case to the district court with instructions to enter judgment for appellants.

So ordered.

APPENDIX A

POWERS OF FEDERAL RESERVE BANKS

Section 13 of Federal Reserve Act of 1913

Sec. 13. Any Federal reverse bank may receive. . . .

• • • •

Any member banks may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

Section fifty-two hundred and two of the Revised Statutes of the Unitel States is hereby amended so as to read as follows: No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

APPENDIX B

1916 Amendments to Federal Reserve Act of 1913

CHAP. 461.—An Act To amend certain sections of the Act entitled "Federal Reserve Act," approved December twenty-third, nineteen hundred and thirteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen, be, and is hereby, amended as follows:

* * * *

That section thirteen be, and is hereby amended to read as follows:

* * * *

"Any Federal reserve bank may make advances to its member banks on their promissory notes for a
[1] period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States."

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so
[2] as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Money deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receiv-
[3] able and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

"That in addition to the powers now vested by law in national banking associations organized under the
[4] laws of the United States any such
[§ 92] association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; . . . *Povided* [sic], *however*, That no such bank shall in any case guarantee . . . the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

"Any member bank may accept drafts or bills of exchange drawn upon it . . . *Provided further*, That
[5] no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

APPENDIX C

Section 20 of the War Finance Corporation Act of 1918

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

TITLE I.—WAR FINANCE CORPORATION

* * * *

Sec. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"Sec. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association or dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

SILBERMAN, Circuit Judge, dissenting:

My position might be thought counter-intuitive, but I would decide the case, as did the district court, without reaching the question the majority thinks is a necessary

antecedent: whether section 92 is still good law. Appellants did not challenge the validity of section 92. Indeed, after the court ordered the parties to address the issue at oral argument and appellees filed supplemental materials supporting the conclusion that the statute was not repealed, counsel for appellants forthrightly said:

> It would quite obviously be to the appellants' advantage if section 92 were no longer in existence, since there would be no statutory basis for the Comptroller's order. We have researched the issue, both earlier and in light of the court's questions, and we have carefully reviewed the submission made by the government. . . . Given that the statutory issue involves a controversy over the use of punctuation, that Congress obviously intended to amend the law in 1982, and that the Supreme Court has in fact described the law as in effect, while noting its curious history, we have concluded that we cannot advance a substantial argument that section 92 no longer exists.

To be sure, when five months later the panel, having not decided the case, directed the parties to brief the issue, appellants—no doubt at that point realizing that their chances for success were dependent upon indulging the court—did so and partially switched their position, urging us to decide whether section 92 exists. But in answer to our question "whether this court should decide the validity of 12 U.S.C. § 92 in the absence of a challenge to its validity," appellants could only suggest that the question might be jurisdictional—that if section 92 actually had been repealed in 1918, the case might be "moot" or perhaps might "not even arise." I do not think there is very much to either argument [1] (nor, apparently,

[1] Although the repeal of a statute moots controversies over the law's validity, *see, e.g., Burke v. Barnes*, 479 U.S. 361, 363-64, 107 S.Ct. 734, 736-37, 93 L.Ed.2d 732 (1987), here the parties *agree* that section 92 is valid, and they have a continuing controversy over the Comptroller's authority to permit national banks to sell

does the majority), but I agree with appellants' implicit premise: that unless we determine the validity question to be jurisdictional, we should not decide it.

My colleagues take a different position. Driven by the perceived duty to inquire, on their own, into section 92's validity, they decide the issue. With all due respect, I think the majority is quite wrong in its perception of our judicial obligation. We owe no abstract duty to Congress (or the President) to enforce or not to enforce laws; all of our power derives from our constitutional duty to decide cases and controversies. The issue of section 92's validity was decidedly not part of the "case or controversy" as it was brought to the district court or on appeal to us. It is quite fair to say that we have added it to the case; we have created a controversy that did not exist. That 1 U.S.C. § 204(a) states that "matter set forth" in the Code "establish[es] prima facie the laws of the United States" hardly suggests any independent duty on the part of the judiciary to inquire whether matters not appearing in the Code, but which the parties agree continue to be law, remain valid.[2]

I do not think my view has ever been stated better than in the passage the majority quotes from *Carducci v. Regan*, 714 F.2d 171 (D.C.Cir.1983), written by then-Judge Scalia:

> The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of

insurance nationwide. And the case obviously arises under federal law for purposes of 28 U.S.C. § 1331, because, *inter alia*, the parties have stated a cause of action under the Administrative Procedure Act, 5 U.S.C. §§ 701-06. *See Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 n. 4, 106 S.Ct. 2860, 2866 n. 4, 92 L.Ed.2d 166 (1986); *Robbins v. Reagan*, 780 F.2d 37, 42 (D.C. Cir. 1985) (per curiam).

[2] I do not think the majority is even correct in using the term "presumption," but our "duty" is not affected in any event.

legal questions presented and argued by the parties before them.

Id. at 177. The majority, however, trumps Judge Scalia in *Carducci* with Justice Scalia in *Arcadia, Ohio v. Ohio Power Co.*, —— U.S. ——, 111 S.Ct. 415, 112 L.Ed.2d 374 (1990). There the Supreme Court decided that a statute, whose exact application was in dispute, did not even apply to a particular transaction, *see id.* 111 S.Ct. at 418, 422, notwithstanding that no party had even suggested such an argument in the Supreme Court or the court of appeals. Justice Scalia, writing for the Court, did not, however, make clear that the statutory construction adopted by the Court was not argued by the parties at any stage (Justice Stevens pointed it out in his concurring opinion, *see id.* 111 S.Ct. at 422-23). So, importantly, the Court never explained or justified what it did. I do not think that under these circumstances the Court meant to establish a precedent on the point.[3] As in the area of standing, I think we should follow only what the Court says it does, not merely what it does. *Cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 119, 104 S.Ct. 900, 918, 79 L.Ed.2d 67 (1984) (court addressing a jurisdictional issue is not bound by prior decisions that passed on the question *sub silentio*); *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 800 (D.C.Cir.1987) (prior decision that reached merits without discussing standing did not constitute precedent on standing).

The next year in *Kamen v. Kemper, Financial Services, Inc.*, —— U.S. ——, 111 S.Ct. 1711, 114 L.Ed.2d 152 (1991), the Court, relying on *Ohio Power*, said that

[3] Perhaps because the Court did not wish to set forth a justifying principle that extended beyond that case. The Supreme Court, I gather, weighs docket management factors that the lower federal courts do not encounter. If the Court wants us to adopt a more relaxed stance than I think appropriate, this case may well offer a suitable vehicle to so instruct us.

"[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Id.* 111 S.Ct. at 1718. Of course, that statement in a sense begs the question, because the hard analysis comes in determining when an issue or claim is properly before the court. In *Kamen*, the petitioner had brought a shareholder derivative action under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 to 80a-64, without making a demand for relief upon the board of directors, effectively asserting her right to do so under federal common law. She did not advert to state law until her reply brief in the court of appeals, and thus that court, in shaping a federal common law rule, refused to consider state law. The Supreme Court reversed, holding that the court of appeals could and should look to state law to fashion the contours of the federal law that governed. *See Kamen*, 111 S.Ct. at 1718. In other words, the petitioner in *Kamen* did assert a right not to make a demand under federal law, and the case was decided on that basis; the Supreme Court only thought that the court of appeals should have looked to state law for guidance. That does not seem to me much different than a court relying on a case not cited by the parties to support a contested proposition. And the Court continued: "We do not mean to suggest that a court of appeals should not treat an unasserted claim as waived. . . ." *Id.* 11 S.Ct. at 1718 n. 5. This is that very case where the unasserted claim (that Congress repealed section 92 and therefore the Comptroller's actions under it were unlawful) was waived; it was, in fact, carefully deliberately, and thoughtfully waived.

The majority's reliance on *Town of South Ottawa v. Perkins*, 94 U.S. 260, 24 L.Ed. 154 (1876), is equally misplaced, because the issue of the statute's validity in that case was raised by the litigants. *See id.* 94 U.S. at

262, 266. Similarly, although the "stipulation of law" cases also cited by the majority establish courts' power to reach nonjurisdictional issues not raised by the parties, they do not suggest that it is always appropriate for courts to do so.

More in point, it seems to me, is *McCormick v. United States*, —— U.S. ——, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991). In that case the Supreme Court refused to consider an appellant's argument, made for the first time in his brief to that Court, that Congress did not intend the anti-extortion Hobbs Act, 18 U.S.C. § 1951, to apply to campaign contributions. Because he concluded that the statute did not apply, Justice Scalia in a concurring opinion said, "I think it well to bear in mind that the statute may not exist." *Id.* at 1820. But he made quite clear that he would not decide the case on that ground. *See id.* The approach taken in *McCormick* accords with other decisions in which courts have declined to consider nonjudisdictional issues not raised by the parties. *See, e.g., Spaulding v. University of Washington*, 740 F.2d 686, 694 n. 2 (9th Cir.) (declining to decide, in a pre-*Garcia* case involving a charge of discrimination under the Equal Pay Act, 29 U.S.C. § 206(d)(1), whether the Act might be unenforceable against the university, a conceded state agency, "[b]ecause the parties neither raise the issue nor contend that it affects our jurisdiction"), *cert. denied*, 469 U.S. 1036, 105 S.Ct. 511, 83 L.Ed.2d 401 (1984).

As acknowledged by the *McCormick* majority, *see McCormick*, 111 S.Ct. at 1814 n. 6, some courts recognize an exception to the general principle of judicial restraint that I assert. The "plain error" doctrine is occasionally applied in the civil as well as the criminal context to decide issues not raised by the parties where manifest injustice might otherwise result. *See, e.g., Anderson v. Group Hospitalization, Inc.*, 820 F.2d 465, 469 n. 1 (D.C. Cir.1987) (discussing civil cases invoking the plain error

rule in exceptional circumstances where error is obvious and grave); *see also Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 2877, 49 L.Ed.2d 826 (1976) (appellate court is justified in resolving issue not raised below if "the proper resolution is beyond any doubt" or "'injustice might otherwise result'" (quoting *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721, 85 L.Ed. 1037 (1941))). But I think that avenue is hardly open to us here, since—as appellants pointed out in their post-argument brief—for over seventy years the Comptroller, Congress, federal courts, and even the Supreme Court, *see Bank*, 405 U.S. 394, 400 n. 12, 92 S.Ct. 1085, 1090 n. 12, 31 L.Ed.2d 318 (1972), have assumed that the statute remains in effect.[4] (It actually appears in the United States Code Service. *See* 12 U.S.C.S. § 92.) Injustice is more likely to result from our reaching the issue than from our declining to do so, because the question of section 92's validity affects many entities, including members of the insurance and banking industries who have relied on the law's continued existence and who, having no notice that the question might be decided, had no opportunity to make their views known in this case. I would therefore affirm the district court on the ground that the Comptroller's ruling is a reasonable interpretation of section 92, and note that we do not decide the significance of Congress' actions in 1918.

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[4] *See* Maj.Op. at 737-39. Although I agree that subsequent assumptions by the executive, legislative, and judicial branches cannot establish Congress' intent in 1918, I do think that such widespread acceptance of section 92's existence precludes us from reaching a different conclusion in the absence of a challenge by one of the parties.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5209

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Appellants

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY, *et al.*

---

and Consolidated Case No. 90-5214

[Filed May 22, 1992]

On Appellees' Petitions for Rehearing

BEFORE: SILBERMAN, BUCKLEY and HENDERSON, *Circuit Judges.*

ORDER

Upon consideration of the petitions for rehearing of appellees, it is

Ordered, by the Court, that the petitions are denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRÉ
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judge Silberman would grant the petition for rehearing of the United States National Bank of Oregon.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 90-5209

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Appellants

v.

ROBERT L. CLARKE,
COMPTROLLER OF THE CURRENCY, *et al.*

No. 90-5214

NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, *et al.*,
Appellants

v.

ROBERT L. CLARKE, *et al.*

[Filed May 22, 1992]

On Appellees' Suggestions for Rehearing *En Banc*

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D.H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges.*

ORDER

Appellees' Suggestions for Rehearing *En Banc* have been circulated to the full Court. The taking of a vote was requested and responses were received. Thereafter, a majority of the judges of the Court in regular active service did not vote in favor of the suggestions. Upon consideration of the foregoing, it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam
For the Court
CONSTANCE L. DUPRÉ
Clerk

Circuit Judges SILBERMAN, WILLIAMS, and D.H. GINSBURG would grant the suggestion of appellee United States National Bank of Oregon, limited to Point II thereof.

Separate statement filed by *Circuit Judge* SENTELLE concurring in the denial of rehearing *en banc*, with whom *Circuit Judges* BUCKLEY and HENDERSON join.

Separate statement filed by *Circuit Judge* SILBERMAN, dissenting from the denial of rehearing *en banc*, with whom *Circuit Judges* WILLIAMS and D.H. GINSBURG join.

Separate statement filed by *Circuit Judge* RANDOLPH.

SENTELLE, *Circuit Judge*, concurring in the denial of rehearing *en banc*, with whom *Circuit Judges* BUCKLEY and HENDERSON join: I write separately expressing concurrence in the Court's denial of rehearing *en banc* to respond briefly to a theory advanced by our dissenting colleagues.

Our colleagues question the "judicial power" of a federal court to decide an issue of law concededly dispositive of the case where parties have not raised the issue. I think it most apparent that federal courts *do* possess this power. The alternative is that the parties could force a federal court to render an advisory opinion. What the dissenters in effect argue is that the parties can stipulate to the state of underlying law; frame a law suit, assuming that stipulation; and obtain from the court a ruling as to what the otherwise dispositive law would be if the stipulated case were in fact the law. Indeed, that is precisely what would have occurred in this case had the panel not, *sua sponte*, raised the question of the repeal of section 92.

It has long been recognized that we are "free to ignore" stipulations as to matters of law, *NLRB, Local 6 v. FLRA*, 842 F.2d 483, 485 n.6 (D.C. Cir. 1988); *see also Barry v. United States*, 865 F.2d 1317, 1326 (D.C. Cir. 1989) ("A concession by a party as to a matter of law, unlike a stipulation of fact, need not hinder a court from finding the proper legal view.") (Sentelle, J., dissenting on other grounds). Thus, by declining to argue that Congress repealed the section, appellants cannot stipulate into existence a repealed statute and then compel the Court to compliantly advise the parties what it would do if that statute existed. "[I]t is quite clear that 'the oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions.'" *Flast v. Cohen*, 397 U.S. 83, 96 (1968) (quoting C. WRIGHT, FEDERAL COURTS 34 (1963)).

The soundness of this rule is suggested by the following: If the parties can by stipulation bring into existence section 92 and have us decide whether the Comptroller properly exercised his authority under the statute, what is to prevent the parties from next asking us whether the delegation of that authority to the Comptroller was constitutional?

That parties have assumed and the Comptroller has enforced the repealed statute for over seventy years seems to me irrelevant to the question. The question is not how long the parties assumed a certain state of the law, but whether that state of the law is merely an assumption. The passage of time, the acquiescence of the parties, the assumptions of officials, even all taken together cannot enact a statute. Legislation only comes into existence through bicameral congressional enactment and presentment to the President of the United States. U.S. CONST. art. I, § 1 and § 7, cl. 2 & 3; *INS v. Chadha*, 462 U.S. 919, 946 (1983). No stipulation by an executive official purporting to operate under a statute and a party affected by the official's actions can bring that statute into existence, even for purposes of a judicial decision as to its construction.

I agree with the dissent that there are obvious limits on the power of the Court—I disagree with the dissent as to what those limits are. I am convinced that it is within the Court's power to determine the existence of a statute essential to the determination of a case or controversy whether or not the parties assume or stipulate that the statute does or does not exist. At bottom, I do not think it within the power of the Court to render an advisory opinion on the construction of a statute whose existence depends on the failure of the parties to assert its invalidity.

SILBERMAN, *Circuit Judge*, dissenting from the denial of rehearing *en banc*, with whom *Circuit Judges* WILLIAMS and D.H. GINSBURG join: We think this case should be reheard *en banc*, but the rehearing should be confined to an issue raised only by appellee United States National Bank of Oregon: did the court properly reach and decide the question whether the statutory provision on which the Comptroller based his regulation, and which has been enforced for over 70 years, was repealed by Congress in 1918? As the dissenting opinion points out, the appellant trade associations, whcih represent insurance agents and underwriters, deliberately refused to argue (waived) any claim that Congress did repeal section 92. Even when the panel ordered supplementary briefing directed to that issue five months after argument, the appellants declined to argue that Congress repealed the section. Since the question is not jurisdictional, we do not see how it can be appropriate for a federal court, *sua sponte*, to decide it, and we fear that the implications of what might be thought a rather expansive view of federal judicial power could be profound indeed.

Almost any case brought rests on certain uncontested legal assumptions that may be thought to be logical antecedents to the issues in dispute. A court is not free, however, to examine itself any of those legal assumptions (if non-jurisdictional) just by asserting that they are "essential to the determination." Concurrence at 2. That would mean that a lawsuit is framed by a court's notion of the logical way to think about a legal problem, and not by the parties' controversy. A majority of this court rejected that concept in a statement of Judge Bork joined by Judges Ginsburg, Scalia, Starr, Silberman, and Buckley concurring in the denial of rehearing *en banc* in *King v. Palmer*, 778 F.2d 878, 883 (D.C. Cir. 1986). The United States, concerned that a panel of this court had accepted and ratified what the United States thought might be an improper expansion of Title VII (to cover a claim for relief "for sex-based discrimination" by a woman who alleged that she was denied a promotion in

favor of another woman who had a sexual relationship with their supervisor, *id.*), wished time to consider whether to file an *amicus* brief supporting rehearing. We denied rehearing because the District of Columbia, the defendant, had not challenged the plaintiff's expansive view of Title VII but rather, assuming coverage, argued that its conduct did not violate the statute. Judge Bork said:

> Rehearing of that issue *en banc* would be inappropriate because no party challenged that application of Title VII on appeal and the issue was not briefed or argued to the panel. . . . Because the point was *not* before the panel on appeal there is no occasion to address the issue *en banc*.

Id. (emphasis in original). In other words, the statement treated the panel's approval of that interpretation, although phrased as a holding, as limited only to that case and therefore not binding precedent. The *en banc* majority thought that even if it disagreed with what the concurrence terms the parties' "stipulation of law," it would be inappropriate to so hold because the issue was not contested in the case.

With all due respect to our concurring colleagues, we think they have the advisory opinion point exactly backwards. An advisory opinion is "an abstract determination by the Court of the validity of a statute . . . or a decision advising what the law would be on a hypothetical state of facts." *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 262 (1933). When a court issues an opinion on an uncontested, non-jurisdictional matter of law like the one here, it has made "an abstract determination . . . of the validity of a statute" and issued an advisory opinion—although to the world rather than the parties—because the issue was not part of the case or controversy.[1]

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[1] It seems to us that the phrase "stipulates to a matter of law" is too general to be useful in consideration of this kind of problem. We would agree, for instance, that if both parties simply misread a Supreme Court decision in their briefs we would not be bound to that interpretation. But that is far removed from a party's failure to bring an analytically separate claim that we thought was available. We are not free to add such a claim to a case.

The government makes a forceful argument that the panel, having reached the question whether section 92 was repealed in 1918, decided the matter incorrectly. Given the importance of this issue to the banking and insurance businesses throughout the country, we would ordinarily be inclined to view the government's petition sympathetically. We do not so regard the government's petition here, because, having vigorously argued before the panel that the court should not reach the "repeal" question, the government now quietly drops that argument and urges us to do that which it originally contended was improper—reach the repeal issue but decide it, instead, in the government's favor.

We full well recognize that the panel's opinion *itself* created legal uncertainty concerning the sale of insurance by banks located and doing business in small towns (which has been the settled practice for most of this century), and, therefore, it would be only natural for the Comptroller to wish a speedy *judicial* action to dispel this uncertainty. But we are frankly disappointed that the government as a whole would not have thought the question of judicial power—surely, in the long run—to be more important.

In any event, the Supreme Court may well be in a better position to deal with both issues. Now that the insurance industry, disinclined to look a gift horse in the mouth, is willing to support the panel's opinion and argue that Congress did repeal section 92, the Supreme Court could grant *certiorari* on that issue and, in light of its supervisory role over federal courts, will give guidance on the question that we think even more significant.

RANDOLPH, *Circuit Judge*: It has become customary for members of this court to issue statements concurring in or dissenting from denials of rehearing *en banc*. I doubt the propriety of this practice. Such statements are rarely confined to setting forth the author's reasons for thinking or not thinking the case important enough to warrant *en banc* treatment. Although the statements may take this form, more often than not they contain expressions of a different sort. Judges commonly use denials of rehearing *en banc* to declare their views on the merits of the case. Those who were not on the original panel announce what they would have decided if only they had been called upon to rule. Judges who were members of the panel express afterthoughts, or respond to criticism contained in the *en banc* statements of other judges, or explain what the panel "really" meant. All of this may be good for the soul. But it rubs against the grain of Article III's ban on advisory opinions. The manner in which these *en banc* "bulletins" are formulated does not simulate the process of the court when it is actually deciding a case. If recurring issues are addressed, *en banc* statements may be tantamount to prejudgments. Another common practice on denials of rehearing *en banc* is, to my mind, also inappropriate. It occurs when the judge steps out of the robe and into the role of an advocate, urging the Supreme Court to take the case on certiorari and correct the panel's judgment.

Many years ago two wise judges found it a "dubious policy" if "any active judge may publish a dissent from any decision, although he did not participate in it and the Court has declined to review it *en banc* thereafter . . . especially since, if the issue is of real importance, further opportunities for expression will assuredly occur," *United States v. New York, New Haven & Hartford R.R.*, 276 F.2d 525, 553 (2d Cir.) (statement of Friendly, J., joined by Lumbard, C.J.), *cert. denied*, 362 U.S. 961 & 964 (1960).

I fully agree with Judge Friendly and Judge Lumbard. In my view, denials of rehearing *en banc* are best followed by silence. They should not serve as the occasion for an exchange of advisory opinions, overtures to the Supreme Court, or press releases.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

Civ. A. Nos. 86-3042, 86-3045

NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, *et al.*,
Plaintiffs,

v.

ROBERT L. CLARKE, *et al.*,
Defendants

and

UNITED STATES NATIONAL BANK OF OREGON,
Defendant-Intervenor.

INDEPENDENT INSURANCE AGENTS OF AMERICA, *et al.*,
Plaintiffs,

v.

ROBERT L. CLARKE, *et al.*,
Defendants

and

UNITED STATES NATIONAL BANK OF OREGON,
Defendant-Intervenor.

[Filed May 8, 1990]

OPINION

JOHN H. PRATT, *District Judge.*

I. *Introduction*

The above action is only the latest chapter in the long running battle for turf on the part of two powerful industries, each of which is subject to governmental regulation. In this case, the insurance industry seeks protection from incursions into its claimed territory by the commercial banking industry. On behalf of life, health, property, and casualty insurance agents throughout the United States, various trade associations brought this consolidated action for declaratory and injunctive relief against the Office of the Comptroller of the Currency ("OCC"), the Comptroller himself, and the United States.[1] After the complaints were filed, the United States Bank of Oregon ("USBO"), a national bank chartered under the National Bank Act, 12 U.S.C. §§ 21-216d (1988) (sometimes "NBA"), intervened as an additional defendant.

At issue is whether the Comptroller reasonably concluded that section 92 of the NBA, *id.* § 92,[2] authorized

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[1] We hereby grant defendants' unopposed request that the complaint, which alleges nothing against the United States *eo nomine*, be summarily dismissed against that party.

[2] It is worth noting that this section no longer appears in the United States Code. Enacted by Act of Sept. 7, 1916, ch. 461, 39 Stat. 753 (1916), it apparently was inadvertently repealed in 1918. *See* Act of Apr. 5, 1918, ch. 45, § 20, 40 Stat. 512 (1918). However, since Congress, other courts, and the Comptroller have presumed its continuing validity, *see, e.g., Commissioner v. First Sec. Bank*, 405 U.S. 394, 401 & n. 12, 92 S.Ct. 1085, 1090 & n. 12, 31 L.Ed.2d 318 (1972); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1261 n. 6 (5th Cir. 1980); *Saxon v. Georgia Ass'n of Indep. Ins. Agents*, 399 F.2d 1010, 1013 (5th Cir. 1968); Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1511 (1982) [hereinafter Garn-St. Germain Act] (purporting to amend § 92); 12 C.F.R. § 7.7100 (1989), we will assume that the statute exists *in proprio vigore*.

USBO, through a subsidiary bank insurance agency, to solicit and sell insurance to customers located throughout the country. Plaintiffs contend that the Comptroller's decision permits USBO and its parent, U.S. Bancorp, a bank holding company registered under the Bank Holding Company Act of 1956, *id.* §§ 1841-1849 (1988) (sometimes "BHCA"), to violate alleged geographic restrictions on insurance activities contained in both the NBA and the BHCA.[3] *Id.* §§ 92, 1843(c)(8). There being no dispute as to any material fact, defendants and USBO moved for summary judgment or dismissal, and plaintiffs crossmoved for summary judgment. The issues have been fully briefed by the parties and the amici curiae.[4]

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[3] Defendants claim that two plaintiffs, the National Association of Life Underwriters ("NALU") and the Oregon Life Underwriters Association ("OLUA"), lack standing because they represent insurance underwriters rather than agents. From plaintiffs' uncontested response, however, it is clear that NALU and OLUA represent insurance agents, not underwriters. As such, they plainly have standing to proceed. *See Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403, 107 S.Ct. 750, 759, 93 L.Ed.2d 757 (1987) ("[C]ompetitors who allege an injury that implicates the policies of the National Bank Act are very reasonable candidates to seek review of the the Comptroller's rulings.").

[4] Plaintiffs have requested leave to file two supplemental exhibits. Proposed Exhibit 16, the text of a June 10, 1987, address by Richard V. Fitzgerald, Chief Counsel of the Comptroller, is a *post hoc* commentary on the mental processes that led to the Comptroller's decision, and thus is not relevant to this case. *See Camp v. Pitts*, 411 U.S. 138, 142, 93 S.Ct. 1241, 1244, 36 L.Ed.2d 106 (1973) (per curiam) (focal point for judicial review of Comptroller's decision should be administrative record already in existence, not some new record); *Environmental Defense Fund v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981) (judicial review of agency action normally confined to full administrative record before agency at time decision was made). Accordingly, leave to file this exhibit is denied. Leave is granted with respect to proposed Exhibit 17, a re-typed version of a previously filed letter from defendants' counsel.

II. *Background*

A. USBO's "New Activities" Proposal

As a national bank, USBO is subject to the regulatory jurisdiction of the Comptroller, the principal expositor of the NBA. *See Clarke v. Securities Industry Association*, 479 U.S. 388, 403-04, 107 S.Ct. 750, 759-60, 93 L.Ed.2d 757 (1987) (citations omitted); *First National Bank v. Smith*, 610 F.2d 1258, 1264 (5th Cir.1980); 12 U.S.C. §§ 1-216d; 12 C.F.R. §§ 1.1, 4.1a-4.11 (1989). Under OCC regulations, a national bank wishing to perform "new activities" through a subsidiary must submit a written proposal to the Deputy Comptroller for the district in which the bank's principal office is located. 12 C.F.R. 5.34(d)(1)(i). Upon receiving such a proposal, the Comptroller evaluates whether the activities would "exceed those legally permissible for a national bank operating subsidiary." *Id.* § 5.34(d)(1)(ii). If the Comptroller requires more than thirty days for this evaluation, he may extend the review period, in which case the bank must await "written notification" before engaging in the "new activities." *Id.*

U.S. Bancorp, USBO's parent, is regulated by the Federal Reserve Board (sometimes the "Board"), which administers the BHCA.[5] *See Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419, 85 S.Ct. 551, 556-57, 13 L.Ed.2d 386 (1965); *Northeast Bancorp, Inc. v. Board of Governors*, 849 F.2d 1499, 1501 (D.C.Cir.1988); 12 U.S.C. §§ 1841-1849; 12 C.F.R. § 225.1. U.S. Bancorp did not submit an application to the Board concerning the proposed "new activities" of USBO. Consequently, the Board was never requested to nor did it approve U.S. Bancorp's indirect involvement in certain insurance activities.

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[5] Although plaintiffs allege violations of the Bank Holding Company Act, neither U.S. Bancorp nor the Federal Reserve Board is a party to this action.

Pursuant to OCC regulations, USBO, whose principal office is in Portland, Oregon, submitted a "new activities" proposal to the OCC's Western District on October 16, 1984. USBO sought to offer, through its subsidiary U.S. Bank Insurance Agency, Inc. ("Bank Agency") "a full range of insurance products" from a branch office of USBO in the small town of Banks, Oregon.[6] Letter from T. Dalrymple to Billy C. Wood (Oct. 16, 1984). USBO relied on section 92 of the NBA and a December 1, 1983, opinion letter [7] to conduct the proposed activities. *See id.*

The primary question raised by the proposal was whether any geographic restrictions applied to the solicitation or sale of insurance authorized by section 92 of the NBA. That section provides that any national bank:

> located and doing business *in any place the population of which does not exceed five thousand inhabitants,* as shown by the last preceding decennial census, *may, under such rules and regulations as may be prescribed by the Comptroller . . ., act as the agent for any fire, life, or other insurance company authorized* . . . to do business in [the state in which the bank is located], *by soliciting and selling insurance and collecting premiums on policies issued by such company. . . .*

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[6] The 1980 census population of Banks was 489.

[7] In 1983, USBO contacted the Assistant Commissioner of the Oregon Department of Commerce concerning the possibility of USBO's acting as an insurance agent through branches in small Oregon communities. The Commissioner requested an opinion from the OCC as to the types of activities authorized by 12 U.S.C. § 92. Letter from Robert E. Miller to Joe Pogar, Regional Counsel (Oct. 7, 1983). The OCC's resultant opinion letter stated, in pertinent part: "[A] national bank or its office may act as an insurance agent without geographic restriction to the community [in which] it is located. However, whether a national bank or its office may act as an insurance agent on an interstate basis is an unsettled issue." Letter from Debra A. Chong, Senior Attorney, Western District, to Robert E. Miller at 1 (Dec. 1, 1983) [hereinafter Chong Letter].

12 U.S.C. § 92 (emphasis added).[8] A similar provision applies to bank holding companies. *See id.* § 1843(c)(8)(C). Section 4(c)(8) of the BHCA prohibits a bank holding company from engaging in, or acquiring and retaining "shares of any company" engaged in, nonbanking activities unless the Board determines that such activities are "so closely related to banking . . . as to be a proper incident thereto." *Id.* § 1843(c)(8); *see Independent Insurance Agents of America, Inc. v. Board of Governors,* 835 F.2d 1452, 1454 (D.C.Cir.1987). Subject to a few limited exceptions, the BHCA precludes the Board from finding that the provision of "insurance as a principal, agent, or broker" is "closely related to banking." *See* 12 U.S.C. § 1843(c)(8). One exception is "any insurance agency activity in a place" with "a population not exceeding five thousand (as shown by the last preceding decennial census)." *Id.* § 1843(c)(8)(C); *see Independent Insurance Agents,* 835 F.2d at 1455 nn. 4-5. This provision was added to the BHCA in 1982 [9] and was "intended to conform to" Board regulations that already permitted such activity,[10] "as well as the authority in" section 92 of the

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[8] As originally enacted in 1916, § 92 also authorized such national banks to act as brokers or agents "in making or procuring loans on real estate located within one hundred miles of the" community. 39 Stat. 753 (1916). This provision was deleted in 1982, Garn-St. Germain Act, *supra* note 2, 96 Stat. 1511, because Congress considered it "obsolete and unjustifiably restrictive." H.R. Conf. Rep. No. 899, 97th Cong., 2d Sess. 89 (1982); *accord* S. Rep. No. 536, 97th Cong., 2d Sess. 27 (1982) [hereinafter Senate Report], U.S. Code Cong. & Admin. News 1982, 3054, 3081.

[9] Garn-St. Germain Act, *supra* note 2, 96 Stat. 1536-37.

[10] Beginning in 1971, the Board determined that certain types of insurance activities were "so closely related to banking" that bank holding companies could engage in them under the BHCA. "One of these was the sale of any insurance in a community that had a population not exceeding 5,000." *Independent Ins. Agents,* 835 F.2d at 1454. In 1979, the Board began to limit this exemption to bank holding companies that (1) had their principal place of business in a small town; and 2) operated another subsidiary serving the public

NBA. Senate Report, *supra* note 8, at 38, U.S.Code Cong. & Admin.News 1982, p. 3092.

Since 1963, over twenty-five years ago, the Comptroller has applied section 92 to any branch office "located in a community of less than 5,000," regardless of whether the bank's principal office is located in a larger community. 12 C.F.R. § 7.7100 (first codified in 1971).[11] Similarly,

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in the small town in which they wished to sell insurance. *See id.* In 1986, after passage of the Garn-St. Germain Act, the Board deleted the principal place of business requirement from its new regulations, having determined that it was not mandated by either the text or the purpose of § 4(c)(8). 12 C.F.R. § 225.25(b)(8)(iii) (1989); *see Independent Ins. Agents*, 835 F.2d at 1455. The D.C. Circuit recently upheld the Board's decision against an attack waged by many of the same trade associations that are plaintiffs in this case. *See Independent Ins. Agents*, 835 F.2d at 1456-57.

[11] After 23 years of silence, plaintiffs now assert that this interpretive ruling is invalid. They claim that Congress could not have intended to authorize insurance activities outside a bank's "headquarted location" because in 1916, when § 92 was enacted, branch banking did not exist. Plaintiffs emphasize that the MacFadden Act, 12 U.S.C. §§ 36, 81, which authorizes national banks to conduct business through branch offices, was not passed until 1927.

This challenge, even if meritorious, is barred by laches. *Independent Bankers Ass'n of Am. v. Heimann*, 627 F.2d 486, 488 (D.C.Cir.1980). Plaintiff's are trade associations "charged by [their] members with anticipating the impact of government rulings" concerning insurance activities banks. *Id.* at 488. As such, their long delay in challenging this ruling is patently unreasonable. *See id.* (12 years held unreasonable). Further, since 1963, some national banks have invested substantial capital in insurance agency branches "that meet the ruling's requirements." *Id.; see, e.g.*, Letter from Michael J. O'Keefe, District Counsel, Midwestern District (June 19, 1986), Ex. 4 to Pls.Mem. [hereinafter O'Keefe Letter]; Letter from David H. Baris, Regional Counsel (Dec. 29, 1978), Ex. 2 to Pls. Mem. [hereinafter Baris Letter]. Equity will not protect those who "through years of silence ha[ve] created an impression of acquiescence that has led others to make substantial financial commitments." *Independent Bankers v. Heimann*, 627 F.2d at 488.

We also note that plaintiffs' challenge is based on a false premise. Contrary to their assertion, branch banking was not unknown in

a Board regulation allows a subsidiary of a bank holding company to engage "in any insurance agency activity in a place" the population of which does not exceed 5,000, provided the subsidiary "has a lending office" there. *Id.* § 225.25(a), (b)(8)(iii).[12] It is the Board's policy, however, that solicitation and sales must be restricted to that place "and to other areas of less than 5,000 adjacent to" it. 51 Fed. Reg. 36,201, 36,206 (Oct. 19, 1986); *see also First United Bancshares, Inc.*, 73 Fed.Res. Bull. 162 (1987).

B. The Comptroller's Approval Letter

The Comptroller notified USBO that review of its proposal would extend beyond thirty days, and that USBO could not conduct the proposed insurance activities unless the Comptroller communicated in writing that he had no objection. Letter from Rufus O. Burns, Jr., District Administrator, Western District, to T. Dalrymple (Oct. 24, 1984). Almost two years later, on August 18, 1986, the Comptroller approved USBO's proposal and, in so doing, authorized Bank Agency, the subsidiary of USBO, "to sell insurance to customers residing outside" Banks, Oregon. *See* Letter from Judith A. Walter, Senior Deputy Comptroller for National Operations, to T. Dalrymple at 4 (Aug. 18, 1986) [hereinafter "Approval Letter" or "Letter"].

1916. At the turn of the century, five national banks and 82 state banks operated a total of 119 branches. *First Nat'l Bank v. Walker Bank & Trust*, 385 U.S. 252, 257, 87 S.Ct. 492, 495, 17 L.Ed.2d 343 (1966) (citation omitted). By the end of 1923, several years prior to the enactment of the McFadden Act, 91 national banks and 580 state banks operated a total of 2,054 branches. *Id.* (citation omitted).

[12] The D.C. Circuit recently upheld this regulation against an attack waged by many of the same trade associations that are plaintiffs in this case. *See Independent Ins. Agents*, 835 F.2d at 1456-57. *See supra* note 10.

The Approval Letter analyzed the text and legislative history of section 92, as well as relevant OCC rules and policies. Section 92, it found, was silent concerning the sale of insurance "to persons and businesses located in different states." *Id.* at 2-3. The Letter then explained that the original statute had included an express geographic restriction (100 miles) applicable to loans on real estate.[13] According to the Letter, this restriction, coupled with the absence of one on insurance activities indicated "congressional intent not to limit geographically a bank's market area for its insurance products." *Id.* at 3 (relying on *expressio unius est exclusio alterius*).

The Approval Letter next explained that section 92's legislative history—essentially only a 1916 letter from Comptroller Williams to the Senate Banking and Currency Committee—did "not directly address [the] geographic limitation" at issue. *Id.* Williams drafted and recommended the passage of what ultimately became section 92's insurance provision. *See id.; see also* 53 Cong. Rec. 11001 (1916).[14] Based on his comments, the Approval Letter concluded that the primary purpose of the insurance provision was to provide additional sources of revenue to national banks that, due to their location in small towns, "were having problems deriving a reasonable profit from their banking business." Approval Letter at 4 (citations omitted).

Allowing sales to customers outside the local population would further this purpose, the Letter reasoned, because the local population's demand for insurance might be too small "to improve significantly the bank's profitability . . . ." *Id.* In this regard, the Letter emphasized that the

[13] *See supra* note 8.

[14] Williams recommended that insurance privileges be granted to national banks located and doing business in communities of 3,000 or fewer inhabitants. *See* 53 Cong.Rec. 11001. Prior to passage, Congress changed the operative figure to 5,000. *See id.* at 11153.

Comptroller had never imposed any geographic restrictions on the insurance activities of small town national banks, and that no relevant restrictions existed under Oregon law. *Id.* The Letter did not address the proposals' legality under the BHCA.

Based on this analysis, the Approval Letter authorized Bank Agency to "sell insurance . . . to existing and potential customers regardless of where [they] are located." *Id.* at 5. The only qualification was that Bank Agency "could not sell insurance . . . to customers located in a state where the" underwriter was not licensed to do business. *Id.* Subsequently, Bank Agency began offering insurance to customers in a number of states. The Federal Reserve Board has never taken any action regarding U.S. Bancorp's indirect involvement in these activities.[15]

Plaintiffs assert that the Approval Letter, by authorizing geographically unlimited sales of insurance, sanctions violations of section 92 of the NBA and section 4(c)(8) of the BHCA.[16] They seek to enjoin the Comptroller to withdraw the Approval Letter and to refrain from granting similar approval to any other national bank. While plaintiffs concede that we lack jurisdiction to adjudicate their BHCA claim,[17] they urge us to find that the Comptroller erroneously approved USBO's proposal without providing the Board an opportunity to consider its legal-

[15] The Board clearly has the power to act. *See* 12 U.S.C. § 1844(b), (c), (e).

[16] Originally, plaintiffs' wide ranging complaint also alleged that the Approval Letter violated the McFadden Act's restrictions on "branch banking," 12 U.S.C. §§ 36, 81. Plaintiffs dropped this claim after USBO affirmed that Bank Agency was the only branch engaged in the insurance activities at issue. *See* Pls.Mem. at 9 n. 6.

[17] Pls.Reply Mem. at 18-19. The Board has exclusive jurisdiction in the first instance to determine the merits of a BHCA challenge, 12 U.S.C. § 1842, with judicial review only in a court of appeals, *id.* § 1848. *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 288 (D.C.Cir. 1988) (citing *Whitney Nat'l Bank*, 379 U.S. at 419-23, 85 S.Ct. at 556-59).

ity under the BHCA. We turn first to plaintiffs' claim under the NBA.

III. *Plaintiffs' Claim Under the National Banking Act*

A. The Applicable Standard of Review

It is undisputed that the Approval Letter of August 18, 1986, is subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1988). *See Camp v. Pitts*, 411 U.S. 138, 140, 93 S.Ct. 1241, 1243, 36 L.Ed.2d 106 (1973) (per curiam); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 156-58 90 S.Ct. 827, 827, 831, 25 L.Ed.2d 184 (1970). However, since no hearing or formal findings were required for the Comptroller to pass on USBO's proposal, his decision can be overturned only if it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Camp v. Pitts*, 411 U.S. at 140-42, 93 S.Ct. at 1243-44 (citing 5 U.S.C. § 706(2)(A)); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413-17, 91 S.Ct. 814, 822-24, 28 L.Ed.2d 136 (1971). Moreover, because we are called upon to review an agency's interpretation of its governing statute,[18] we are required to apply the landmark test announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). *See Sullivan v. Everhart*, —— U.S. ——, 110 S.Ct. 960, 964, 108 L.Ed.2d 72 (1990).

Under *Chevron*, our first inquiry is whether Congress has directly addressed the issue of geographic restrictions on insurance sales under section 92. *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781. "If the intent of Congress is clear, that is the end of the matter; for the court as well as the

[18] *See Clarke v. Securities Indus. Ass'n*, 479 U.S. at 403-04, 107 S.Ct. at 759-60 (citations omitted); *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971) (citation omitted).

agency, must give effect to the unambiguously expressed intent of Congress." *Id.* 467 U.S. at 842-43, 104 S.Ct. at 2781. However, "if the statute is silent or ambiguous with respect to [this] issue," we must determine whether the Comptroller's construction is "permissible," *id.* 467 U.S. at 843, 104 S.Ct. at 2781, that is, whether it is "rational and consistent with the statute." *NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 123, 108 S.Ct. 413, 420-21, 98 L.Ed.2d 429 (1987). In so doing, we must give "great weight" to any reasonable interpretation the Comptroller has adopted. *Clarke v. Securities Industry Association*, 479 U.S. at 403-04, 107 S.Ct. at 759-60 (citations omitted); *Investment Co. Institute v. Camp*, 401 U.S. 617, 626-27, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971) (citiation omitted); *see Securities Industry Association v. Board of Governors*, 821 F.2d 810, 813 (D.C.Cir.1987) (citations omitted), *cert. denied*, 484 U.S. 1005, 108 S.Ct. 697, 98 L.Ed.2d 649 (1988).

B. Chevron Step One

Plaintiffs contend that the Comptroller's interpretation contradicts the plain meaning of the statute. According to plaintiffs, section 92 clearly limits insurance sales and solicitation to the small community in which the bank's selling office is located, in this case Banks, Oregon. This of course misstates the facts. We agree with the Comptroller that the statute is silent on this issue.

As in all cases of statutory interpretation, we begin by examining the statutory language itself. *Investment Co. Inst. v. Conover*, 790 F.2d 925, 933 (D.C.Cir.), *cert. denied*, 479 U.S. 939, 107 S.Ct. 93 L.Ed.2d 372 (1986); *see K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S.Ct. 1811, 1817, 100 L.Ed.2d 313 (1988) (citation omitted). Section 92 plainly permits Bank Agency, under such regulations as the Comptroller may prescribe, to solicit and sell insurance for any insurance company authorized to do business in Oregon. *See* 12 U.S.C. § 92.

Beyond this, the statute says little. It does not refer to the market Bank Agency may serve, much less restrict solicitation or sales to the residents of Banks. *See id.* This silence, coupled with the express delegation of rule-making authority to the Comptroller, suggests that Congress explicitly "left a gap for the [Comptroller] to fill." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781.

Plaintiffs argue, however, that a geographic restriction is implicit in the statute's requirement that the selling office be "located and doing business" in a small community. 12 U.S.C. § 92. Plaintiffs stretch the text too far. The phrase "located and doing business" plainly refers to the location of Bank Agency, not the customers to whom it may sell. Certainly USBO may accept deposits or extend credit to customers located outside Banks. Nowhere else does the NBA prohibit a national bank from offering its services to customers residing outside the community in which it is located. Indeed, an "affirmative indication" is required "to justify [a statutory] interpretation that would permit a national bank to engage in a business but" prevent the bank from advertising it. *Franklin National Bank v. New York*, 347 U.S. 373, 377-78, 74 S.Ct. 550, 553, 98 L.Ed. 767 (1954). Therefore, if Congress had intended to impose such a prohibition here, it presumably would have done so expressly.

Plaintiffs also attempt to read a geographic restriction into section 92's provision that underwriters whose policies a national bank sells be authorized to do business in the state in which the bank's selling office is located. 12 U.S.C. § 92. Again plaintiffs stretch the text too far. We agree with defendants that this provision "does not even hint at any restriction on the location of customers, much less any requirement that . . . customers reside only in the small community in which the [selling] office is located." USBO's Reply Mem. at 8. Rather, it seems merely to reflect Congress' recognition that insurance is essentially a state-regulated industry. *See* Dfs. Reply Mem. at 7-8.

At the risk of laboring the obvious, our first injury under *Chevron* does not end with the statutory language itself. It is helpful to examine "the language and design of the statute as a whole" for signs of congressional intent on the issue at hand. *K Mart Corp.*, 486 U.S. at 291, 108 S.Ct. at 1817 (citation omitted). We are not unmindful of the fact that, as originally enacted, section 92 also authorized small town national banks to engage in mortgage activities. 39 Stat. 753 (1916).[19] Significantly Congress expressly restricted the scope of these activities. A small town national bank could procure "loans on real estate located within one hundred miles of the" bank's office. *Id.* This provision indicates that Congress knew how to impose geographic restrictions when it wanted to. It deliberately chose not to with respect to insurance activities.[20]

Turning next to the legislative history, we agree with the Comptroller that this history does not directly address the issue. The only substantive comments regarding section 92's insurance provision are contained in a letter to the Senate Banking and Currency Committee from Comptroller Williams, who drafted the provision and recommended its adoption by Congress. *See* 53 Cong.Rec.

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[19] *See supra* note 8.

[20] Under the maxim *expressio unius est exclusio alterius*, if " 'Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposedly in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). While this maxim is subordinate " 'to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose,' " *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387 n. 23, 103 S.Ct. 683, 690, 74 L.Ed.2d 548 (1983) (quoting *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51, 64 S.Ct. 120, 123, 88 L.Ed. 88 (1943)), there is no conflict between the two in this case. As discussed immediately *infra*, the primary purpose of the legislation does not require the imposition of geographic restrictions on insurance sales and solicitation.

11001 (1916). Wiliams was concerned with the competitive problems faced by many small national banks and their negative consequences for customers. While small national banks endowed with "average deposits" and "good management" could lend money at legal interest rates and still return a profit, "many banks," due to "small deposits," were unable to accomplish this task. *Id.* As a result, these bank often charged "excessive and in some cases grossly usurious" interest rates. *Id.* Williams believed the bank needed "additional sources of revenue" in order to compete more effectively "with local State banks and trust companies which are sometimes authorized . . . to do a class of business not strictly that of commercial banking." *Id.* Accordingly, he recommended that national banks "located in villages and towns" with populations not in excess of 3,000 [21] "be permitted to acts as agents for insurance companies . . . and for the negotiation of loans on . . . real estate. . . ." [22] *Id.*

Plaintiffs, recognizing Williams' concern with small, struggling banks, question its applicability to USBO, the forty-fourth largest bank in the country. Clearly, however, the statute makes no distinction between profitable and unprofitable banks. *Cf. United States v. Naftalin*, 441 U.S. 768, 773, 99 S.Ct. 2077, 2081, 60 L.Ed.2d 624 (1979) ("The short answer is that Congress did not write the statute that way."). Moreover, there is no indication that Williams *intended* to create such a distinction. Although he recognized that some small town banks were profitable, *see* 53 Cong.Rec. 11001, he recommended a provision that on its fact applies to *all* small town banks, regardless of

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[21] Congress changed the operative number to 5,000. *See* 53 Cong. Rec. 11153.

[22] Williams believed that the real estate should be located in the bank's region of the country, where the bank might "have some direct knowledge as to [its] value. . . ." 53 Cong. Rec. 11001. He recommended no similar limitation on insurance activities.

size or capitalization level. *See* 12 U.S.C. § 92. Finally, since 1963 the Comptroller has extended insurance privileges to branch offices, such as Bank Agency, that meet the statute's locational requirement. 12 C.F.R. § 7.7100. As we stated earlier, this interpretive ruling is no longer subject to challenge.[23] In light of these factors, we find plaintiffs' contention completely without merit.

Williams also expressed his views on why his proposal should be limited "to banks in small communities." 53 Cong.Rec. 11001. While "the new business" would help small town banks to become profitable, he doubted it would "assume such proportions as to distract [bank] officers . . . from the principal business of banking." *Id.* For city banks, however, he thought the banking business already "afford[ed] ample scope for the energies of trained and expert bankers." *Id.* Williams also predicted that "in many small places" the market for insurance or mortgages would not "take up the entire time of an insurance broker," and that small town banks therefore would be unlikely "to trespass upon outside business naturally belonging to others." *Id.* Apparently, Williams assumed that a low demand for insurance in many small towns would deter insurance agents from soliciting there.

Plaintiffs argue that Williams' second rationale mandates a narrow construction of section 92. It envinces, they claim, a legislative intent to prohibit banks from marketing insurance outside the small towns in which they are located. Again we disagree. Williams' statement bears the indicia of a prediction, not a prerequisite. *See id.* ("the bank is not . . . *likely* to trespass") (emphasis added). As such, it is an insufficient basis for reading a geographic restriction into an otherwise silent statute. Moreover, we are not convinced that Williams would have written the statute any differently had he foreseen the societal changes that have rendered his pre-

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[23] *See supra* note 11.

diction anachronistic.[24] As stated earlier, his primary goal was to provide small town banks with additional sources of revenue, not to protect the markets of competing insurance agents. *See id.* In the absence of a clearer indication of legislative intent, we are not free "to redraft" the statute "in an effort to achieve that which" plaintiffs believe Congress "ha[s] failed to do." *United States v. Locke*, 471 U.S. 84, 95, 105 S.Ct. 1785, 1792-93, 85 L.Ed.2d 64 (1985).

C. Chevron Step Two

Because we hold that section 92 is silent with respect to geographic limitations on sales and solicitation, we must defer to any reasonable interpretation by the Comptroller on that issue. *See Chevron*, 467 U.S. at 843, 104 S.Ct. at 2781; *Clinchfield Coal Co. v. Federal Mine Safety & Health Commission*, 895 F.2d 773 at 779-80 (D.C.Cir. 1990); *Securities Industry Association v. Board of Governors*, 821 F.2d at 813; *Investment Co. Institute v. FDIC*, 815 F.2d 1540, 1546 (D.C. Cir.), *cert. denied*, 484 U.S. 847, 108 S.Ct. 143, 98 L.Ed.2d 99 (1987). As our analysis under the first prong of *Chevron* indicates, "the literal language" of section 92 supports the Comptroller "and nothing in the legislative history" or the statute's purpose "casts doubt on [his] interpretation." *Northeast Bancorp*, 849 F.2d at 1503. According to plaintiffs, however, there are at least three reasons why the Approval Letter deserves no deference. First, they claim, it contravenes the general policy reflected in the country's banking laws of separating banking from commerce. Second, they argue that section 92 and the BHCA's "small town" insurance activities provision should be considered together, and that the latter clearly restricts the geographic scope of solicitation and sales. Third, plaintiffs contend that the Comptroller's decision is inconsistent with prior agency rulings on the same issue.

[24] We take judicial notice of the fact that this country is more densely populated and technologically advanced now than it was in 1916.

1. *The Policy of Separating Banking From Commerce*

Plaintiffs maintain that the banking laws of this country reflect a clear congressional policy to separate banking from commerce. In the present case, however, neither the fact of the statute nor the legislative history contradicts the Comptroller. Therefore, even assuming *arguendo* that plaintiffs statement of general policy is correct,[25] their argument must fail. *See Investment Co. Institute v. FDIC*, 815 F.2d at 1549 (citing *Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2781-82). "It is not our place to implement congressional policy in ways Congress itself fails to pursue." *Id.* (citing *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 373-74, 106 S.Ct. 681, 688-89, 88 L.Ed.2d 691 (1986); *TVA v. Hill*, 437 U.S. 153, 194-95, 98 S.Ct. 2279, 2301-02, 57 L.Ed.2d 117 (1978)); *see also Chevron*, 467 U.S. at 866, 104 S.Ct. at 2793.

2. *The Effect of Section 4(c)(8)(C) of the Bank Holding Company Act*

Plaintiffs next argue that section 4(c)(8)(C) of the Bank Holding Company Act and section 92 of the National Bank Act are *in pari materia*—that is, pertain to the same subject—and thus should be construed together. They maintain that section 4(c)(8)(C), the similar "small town" exception applicable to bank holding companies, "unequivocally limits the geographic scope" of insurance activities to the small community in which the bank is located. Pls. Reply Mem. at 6. Plaintiffs assert that "[t]his parallel provision," which was passed in 1982, "sweeps away any ambiguity in the legislative history of section 92 itself." *Id.* at 5. In short, they ask us to find

[25] It is worth noting that § 92 is not the only "exception" to this "policy." For example, Congress has authorized national banks to deal in securities of certain governmental entities and to offer investments in the form of commingled investment retirement accounts. Glass-Steagall Act, § 16, 12 U.S.C. § 24 (Seventh); *see Investment Co. Inst. v. Conover*, 790 F.2d 925.

that section 92 is governed by the same geographic limitations they claim are mandated by section 4(c)(8)(C) of the BHCA. For the reasons that follow, we reject their interpretation.

Clearly, the language of the two provisions is not identical. Whereas section 4(c)(8)(C) authorizes "any insurance agency activity in a place" whose population does not exceed 5,000, 12 U.S.C. § 1843(c)(8)(C), section 92 empowers a national bank "located and doing business in" such a place to act as a general insurance agent. *Id.* § 92. As a general rule, "[l]anguage in one statute usually sheds little light upon the meaning of different language in another statute," and "[t]he use of the specific in the [former] cannot fairly be read as imposing a limitation upon the general provision in the [latter]." *Russello v. United States*, 464 U.S. 16, 25, 104 S.Ct. 296, 301, 78 L.Ed.2d 17 (1983). Therefore, even if section 4(c)(8)(C) plainly restricted solicitation and sales to a place whose population does not exceed 5,000,[26] there ordinarily would be no justification for reading that restriction into the less specific terms of section 92.

The canon of *in pari materia* is a rather narrow exception to the general rule that different statutes should be read differently. In this case, the canon simply does not apply. The two provisions were enacted over sixty-five years apart and deal with two different types of

[26] We question whether the geographic scope of the BHCA's "small town" exception is "unequivocally limit[ed]." Pls.Reply Mem. at 6. Although § 4(c)(8)(C) was "intended to conform to" existing Board regulations, Senate Report, *supra* note 8, at 38, U.S. Code Cong. & Admin. News 1982, p. 3092, one of which limited "solicitation or sales . . . to the small town and to other areas of less than 5,000 adjacent to" it, 51 Fed. Reg. at 36,206; *see First United Bancshares*, 73 Fed. Res. Bull. 162, the Board has subsequently departed from at least one of these regulations. *See Independent Ins. Agents*, 835 F.2d 1452 (agreeing with Board that statute did not compel principal place of business requirement); 12 C.F.R. § 225.25(b)(8)(iii); *see also supra* notes 10 & 12 and text accompanying note 12.

banking institutions, each subject to a distinct set of laws and regulations administered by separate agencies. *See Erlenbaugh v. United States*, 409 U.S. 239, 244, 93 S.Ct. 477, 480, 34 L.Ed.2d 446 (1972) (rule's application makes the most sense when the statutes are on the same subject and were enacted by the same Congress at the same time). In addition, the statutes were not "intended to serve the same function." *Id.* 409 U.S. at 245, 93 S.Ct. at 481. The BHCA provision is concerned with activities that are "so closely related to banking . . . as to be a proper incident thereto," 12 U.S.C. § 1843(c)(8), whereas section 92 was designed to help small town banks increase their earnings by providing them with another source of revenue. *See* 53 Cong.Rec. 11001.

Section 4(c)(8) prohibits a bank holding company from engaging in, or owning "shares of any company" engaged in, nonbanking activities unless the Board determines that such activities are "so closely related to banking . . . as to be a proper incident thereto." 12 U.S.C. § 1843(c)(8); *see Independent Insurance Agents*, 835 F.2d at 1454. With a few exceptions, the statute precludes the Board from finding that the sale of "insurance as a principal, agent, or broker" is "closely related to banking." *See* 12 U.S.C. § 1843(c)(8). One exception is "any insurance agency activity in a place" whose population does not exceed 5,000. *Id.* § 1843(c)(8)(C); *see Independent Insurance Agents*, 835 F.2d at 1455 nn. 4-5.

Section 92 addresses a completely unrelated concern: the need to provide small town national banks with additional sources of revenues. The authority it confers is in no way tied to whether the insurance activity is "closely related to banking." *See* 12 U.S.C. § 92. In fact, section 92 is a specific exception to the general rule that national banks are limited to "such incidental powers as shall be necessary to carry on the business of banking." *Id.* § 24 (Seventh).

Although the BHCA provision was "intended to conform to," *inter alia*, "the authority in" section 92, Senate

Report, *supra* note 8, at 38, U.S.Code Cong. & Admin. News 1982, p. 3092, this alone is an insufficient reason to hold that the two sections are *in pari materia*. In light of the countervailing considerations discussed above, we are confident that the sections need not be construed together.

Plaintiffs next posit that, in passing the BHCA provision, Congress assumed that section 92 imposed geographic restrictions on sales and solicitation. Congress' understanding is clear, plaintiffs theorize, from the fact that section 4(c)(8)(C) "unequivocally limits the geographic scope" of insurance activities, Pls. Reply Mem. at 6, and was "intended to conform to . . . the authority in" section 92, Senate Report, *supra* note 8, at 38, U.S. Code Cong. & Admin.News 1982, p. 3092. This postulate, even if true, would not alter the reasonableness of the Comptroller's interpretation.

Our review in this case centers on congressional intent in 1916, when section 92 was enacted. Since nothing in the BHCA itself sheds light on that intent, plaintiffs cannot rely on the maxim, announced in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 371 (1969), that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 116-18 & n. 13, 100 S.Ct. 2051, 2060-61 & n. 13, 64 L.Ed.2d 766 (1980). The maxim does not apply to "[a] mere statement in a conference report . . . as to what the Committee believes an earlier statute meant. . . ." *Id.* 447 U.S. at 118 n. 13, 100 S.Ct. at 2061 n. 13; *see United States v. Southwestern Cable Co.*, 392 U.S. 157, 170, 88 S.Ct. 1994, 2001, 20 L.Ed.2d 1001 (1968) (one Congress' views as to construction of statute adopted many years earlier by another Congress have minimal or no significance) (citations omitted). Indeed, "subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history *prior* to its enactment." *GTE Sylvania*, 447 U.S. at 118 n. 13, 100 S.Ct. at 2061 n. 13 (emphasis added); *cf., e.g., United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 331, 4 L.Ed.2d 334 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (citation omitted). In this case, where "the literal language" of section 92 supports the Comptroller "and nothing in the legislative history" or the statute's purpose "casts doubt on [his] interpretation," *Northeast Bancorp*, 849 F.2d at 1503, we see no reason to depart from this principle.

At this juncture, it is worth underscoring that Congress has charged separate agencies with administering the BHCA and the NBA. As USBO points out, nothing in the BHCA or its legislative history suggests that the Comptroller of the Currency must cede his interpretive authority over section 92 in favor of accepting any interpretation of section 4(c)(8)(C) that the Federal Reserve Board may choose to adopt. USBO's Reply Mem. at 30-31. If Congress wishes to avoid inconsistent interpretations of the two provisions, Congress alone has the power to act. In the meantime, the agencies are free to implement any reasonable policy where Congress has left a gap. *See Chevron*, 467 U.S. at 866, 104 S.Ct. at 2793. The Comptroller has done just that. The fact that his conclusion may be at odds with the Board's is not our concern.

3. *Prior Comptroller Interpretations*

Where an agency's interpretation of a statutory provision " 'is inconsistent with its prior analysis in similar situations without any acknowledgement of the fact, or cogent explanation as to why,' the 'result reached by the agency is impermissible under the second prong of *Chevron.*' " *General Motors Corp. v. National Highway Traffic Safety Administration*, 898 F.2d 165 at 174 (D.C.Cir. 1990) (quoting *King Broadcasting Co. v. FCC*, 860 F.2d

465, 470 (D.C.Cir.1988)). Plaintiffs assert that the Approval Letter is inconsistent with earlier positions taken by the Comptroller regarding geographic restrictions under section 92. We conclude, however, that prior to the Approval Letter, the Comptroller had never undertaken a comprehensive analysis of or implemented a restrictive policy on this issue. *Compare National Black Media Coalition v. FCC*, 775 F.2d 342, 355 (D.C.Cir.1985) ("After announcing a prospective rule and applying it faithfully for six years, the Commission, in effect, ignored it here."). Moreover, even if the Approval Letter represented a departure from prior policy, the Comptroller certainly provided a "cogent explanation as to why." *King Broadcasting*, 860 F.2d at 470. Therefore, plaintiffs' argument must fail.

Plaintiffs rely on statements in a few opinion letters, but these do not support their assertion. First, each statement constituted informal advice or opinion, not a definitive announcement of policy. *Compare National Black Media Coalition*, 775 F.2d at 355 ("After announcing a prospective rule and applying it faithfully for six years, the Commission, in effect, ignored it here."). Second, none of the statements establishes the position plaintiffs urge—that section 92 restricts insurance sales and solicitation to residents of the community in which the bank's selling office is located.[27]

[27] The Comptroller's views on the geographic area a bank insurance agency may serve were first requested in mid-1970. *Letter* Letter from Robert Bloom, Chief Counsel, at 1 (July 17, 1970), Ex. 1 to Pls.Mem. [hereinafter Bloom Letter]. At that time, "[t]he only generalization" the Comptroller could "safely" make was that § 92 did not authorize a "significantly greater" "service area for the insurance activity . . . than that of the banking activity of the owner bank." *Id.* at 2. While plaintiffs rely heavily on this statement, they ignore that the very next year the Comptroller did not object to a bank's using an official at its main office to solicit business for its branch insurance agency. *See* Letter from Thomas G. DeSnazo, Deputy Comptroller (June 9, 1971). They also overlook a 1978 "no objection" letter issued to a bank that proposed to sell insurance from its small town agency to customers of other branches located in larger towns. Baris Letter, *supra* note 11. As these and other letters demonstrate, the Comptroller has never limited insurance sales to the community in which the selling office is located.

Plaintiffs maintain, however, that the Bloom Letter announced at least *some* geographic restriction, and that the Approval Letter unjustifiably disregarded this policy. We reject this assertion for three independent reasons. First, we doubt that the Bloom Letter ever constituted a definitive policy statement. *See* O'Keefe Letter, *supra* note 11, at 2; Chong Letter, *supra* note 7, at 1. Second, even if it did, the Approval Letter did not necessarily depart from it. The Bloom Letter simply opined that § 92 did not authorize a "significantly greater" "service area for the insurance activity . . . than that of the banking activity of the owner bank." Bloom Letter at 2. As we stated earlier, a national bank is free to offer its services to customers residing outside the community in which it is located. *See Franklin Nat'l Bank*, 347 U.S. at 377-78, 74 S.Ct. at 553. Therefore, with today's advanced mail and wire services and expansive advertising capabilities, the service area for a bank's customary business is potentially world-wide. Plaintiffs have not alleged that USBO's banking activity is limited to Banks, Oregon, or that it does not extend to the states in which Bank Agency currently offers insurance. Third, the Comptroller certainly has offered a "cogent explanation as to why" he believes that no geographic restrictions apply. *King Broadcasting*, 860 F.2d at 470. The Approval Letter was over twice as long as the Bloom Letter, and engaged in a much more in-depth analysis of the language and purpose of § 92. Therefore, the Comptroller's decision, even if inconsistent with past policy, was completely justified. *See General Motors*, 898 F.2d at 174 (citing *King Broadcasting*, 860 F.2d at 470).

Based on the foregoing analysis, we hold that the Comptroller's interpretation, being "rational and consistent with the statute," must be upheld. *NLRB v. United Food & Comercial Workers*, 484 U.S. at 123, 108 S.Ct. at 420-21; *see Chevron*, 467 U.S. at 843-44, 104 S.Ct. at 2781-82. We turn now to plaintiffs' claim under the BHCA.

IV. *Plaintiffs' Claim Under the Bank Holding Company Act*

As independent issue from the reasonableness of the Comptroller's construction of section 92 is whether the

BHCA bars U.S. Bancorp, USBO's parent, from "launching nationwide insurance activities" through Bank Agency, USBO's subsidiary. Pls. Reply Mem. at 18. While plaintiffs concede that we lack jurisdiction to decide the merits of this question,[28] they contend that the Comptroller erred by issuing the Approval Letter without providing the Board "an opportunity to consider the legality of the proposed transaction." *Id.* at 19. Citing Supreme Court dictum that "exceptional circumstances . . . may stay the hand of the Comptroller," *Whitney National Bank*, 379 U.S. at 426 n. 7, 85 S.Ct. at 560 n. 7, plaintiffs argue that an injunction would be appropriate in this case. They rely on *Independent Bankers Association of America v. Conover*, 603 F.Supp. 948, 958 (D.D.C.1985), in which the district court held that it was authorized to determine whether the Comptroller's action raised "substantial" questions under the BHCA and whether an injunction should issue to allow the Board to resolve those questions.

Courts have been reluctant to find the existence of "exceptional circumstances" that would warrant such an injunction. *See, e.g., American Insurance Association v. Clarke*, 865 F.2d 278, 288 (D.C.Cir.1988). This reluctance is especially justified when an injunction would halt the operations of an ongoing business such as Bank Agency. *Cf. Marshall & Ilsley Corp. v. Heimann*, 652 F.2d 685, 701 n. 27 (7th Cir.1981) (where ultimate relief requested was not a mere stay of Comptroller's proposed action, as in *Whitney*, but divestiture of assets acquired almost four years earlier, stay pending Board review would be inappropriate), *cert. denied*, 455 U.S. 981, 102 S.Ct. 1489, 71 L.Ed.2d 691 (1982). Moreover, we take "notice of the obvious fact that the Board has not taken advantage of its ample opportunity to act on" USBO's proposal.[29] *Independent Bankers v. Conover*, 603 F.Supp. at 958 n. 17. "Although the *Whitney* test is not time-bound, it appears that the original concern was that the Board had 'not had an *opportunity* to determine' the issue presented." *Id.* (quoting *Whitney*, 379 U.S. at 425, 85 S.Ct. at 560) (emphasis in *Independent Bankers v. Conover*). In *Independent Bankers v. Conover*, the Board had taken no action for over one and a half years. *Id.* In the present case, almost four years have elapsed since the Comptroller issued the Approval Letter. During that time, the Board has taken no steps toward resolving the allegedly "substantial" BHCA issue arising therefrom. We are satisfied that under these circumstances there is no compelling need for an injunction.

[28] Pls.Reply Mem. at 18-19; *see supra* note 17.

[29] The Board clearly has the power to act. *See* 12 U.S.C. § 1844 (b), (c), (e).

V. *Conclusion*

Based on the foregoing analysis, we hold:

(1) that section 92 of the NBA is silent on the issue of geographic restrictions on the solicitation and sale of insurance;

(2) that the Comptroller reasonably and permissibly interpreted section 92 as authorizing Bank Agency, a subsidiary of USBO, to offer insurance to customers residing outside Banks, Oregon, regardless of the geographic location of said customers;

(3) that there are no "exceptional circumstances" in this case warranting a stay of the Comptroller's decision pending Federal Reserve Board review of the legality of USBO's proposal under the BHCA; and

(4) plaintiffs' claims for relief should be addressed to Congress; this Court is the wrong forum.

An order consistent with this Opinion has been entered this day.

ORDER

Upon consideration of the motions of defendants and defendant-intervenor for dismissal or summary judgment and plaintiffs' cross-motion for summary judgment, the oppositions thereto, the briefs of amici curiae, and the entire record here, and for the reasons stated in an accompanying Opinion entered this day, it is by the Court this 8th day of May, 1990,

ORDERED that summary judgment is entered in favor of defendants and defendant-intervenor on all counts; it is

ORDERED that plaintiffs' cross-motion for summary judgment is denied; and it is

FURTHER ORDERED that this case is dismissed with prejudice.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752:

CHAP. 461.—An Act To amend certain sections of the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "Federal reserve Act" approved December twenty-third, nineteen hundred and thirteen, be, and is hereby, amended as follows:

At the end of section eleven insert a new clause as follows:

"(m) Upon the affirmative vote of not less than five of its members the Federal Reserve Board shall have power, from time to time, by general ruling, covering all districts alike, to permit member banks to carry in the Federal reserve banks of their respective districts any portion of their reserves now required by section nineteen of this Act to be held in their own vaults."

That section thirteen be, and is hereby, amended to read as follows:

[1] "Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, payable upon presentation, and also, for collection, maturing bills; or solely for purposes of exchange or of collection, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks upon other Fed-

eral reserve banks, and checks and drafts, payable upon presentation within its district, and maturing bills payable within its district.

[2] "Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice and protest by such bank as to its own indorsement exclusively, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturiy at the time of discount of not more than ninety days, exclusive of days of grace: *Provided*, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months, exclusive of days of grace, may be discounted in an amount to be limited to a percentage of the assets of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

[3] "The aggregate of such notes, drafts, and bills bearing the signature or indorsement of any one borrower, whether a person, company, firm, or corporation, rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

[4] "Any Federal reserve bank may discount acceptances of the kinds hereinafter described, which have a maturity at the time of discount of not more than three months' sight, exclusive of days of grace, and which are indorsed by at least one member bank.

[5] "Any member bank may accept drafts or bills of exchange drawn upon it having not more than six months' sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods; or which grow out of transactions involving the domestic shipment of goods provided shipping documents conveying or securing title are attached at the time of acceptance; or which are secured at the time of acceptance by a warehouse receipt or other such document conveying or securing title covering readily marketable staples. No member bank shall accept, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per cent of its paid-up and unimpaired capital stock and surplus unless the bank is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance and no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus.

[6] "Any Federal reserve bank may make advances to its member banks on their promissory notes for a

period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States."

[7] Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal reserve Act.

[8] "The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

[9] "That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as an agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: *Provided, however*, That no such bank shall in any case guarantee either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

[10] "Any member bank may accept drafts or bills of exchange drawn upon it having not more than three months' sight to run, exclusive of days of grace, drawn under regulations to be prescribed by the Federal Reserve Board by banks or bankers in foreign countries or dependencies or insular possessions of the United States or the purpose of furnishing dollar exchange as required by the usages of trade in the respective countries, dependencies, or insular posses-

sions. Such drafts or bills may be acquired by Federal reserve banks in such amounts and subject to such regulations, restrictions, and limitations as may be prescribed by the Federal Reserve Board: *Provided, however*, That no member bank shall accept such drafts or bills of exchange referred to this paragraph for any one bank to an amount exceeding in the aggregate ten per centum of the paid-up and unimpaired capital and surplus of the accepting bank unless the draft or bill of exchange is accompanied by documents conveying or securing title or by some other adequate security: *Provided further*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

That subsection (e) of section fourteen, be, and is hereby, amended to read as follows:

"(e) To establish accounts with other Federal reserve banks for exchange purposes and, with the consent of the Federal Reserve Board, to open and maintain accounts in foreign countries, appoint correspondents, and establish agencies in such countries wheresoever it may deem best for the purpose of purchasing, selling, and collecting bills of exchange, and to buy and sell, with or without its indorsement, through such correspondents or agencies bills of exchange arising out of actual commercial transactions which have not more than ninety days to run, exclusive of days of grace, and which bear the signature of two or more responsible parties, and, with the consent of the Federal Reserve Board, to open and maintain banking accounts for such foreign correspondents or agencies."

That the second paragraph of section sixteen be, and is hereby, amended to read as follows:

"Any Federal reserve bank may make application to the local Federal reserve agent for such amount of the Federal reserve notes hereinbefore provided for as it may require. Such application shall be accompanied with a tender to the local Federal reserve agent of collateral in amount equal to the sum of the Federal reserve notes thus applied for and issued pursuant to such application. The collateral security thus offered shall be notes, drafts, bills of exchange, or acceptances rediscounted under the provisions of section thirteen of this Act, or bills of exchange indorsed by a member bank of any Federal reserve district and purchased under the provisions of section fourteen of this Act, or bankers' acceptances purchased under the provisions of said section fourteen. The Federal reserve agent shall each day notify the Federal Reserve Board of all issues and withdrawals of Federal reserve notes to and by the Federal reserve bank to which he is accredited. The said Federal Reserve Board may at any time call upon a Federal reserve bank for additional security to protect the Federal reserve notes issued to it."

That section twenty-four be, and is hereby, amended to read as follows:

"SEC. 24. Any national banking association not situated in a central reserve city may make loans secured by improved and unencumbered farm land situated within its Federal reserve district or within a radius of one hundred miles of the place in which such bank is located, irrespective of district lines, and may also make loans secured by improved and unencumbered real estate located within one hundred miles of the place in which such bank is located irrespective of district lines; but no loan made upon the security of such farm land shall be made for a longer time than five years, and no loan made upon the security of such real estate as distinguished from farm land shall be made for a longer time than one year nor shall the amount of any such loan, whether upon such farm land or upon such real estate, exceed fifty

per centum of the actual value of the property offered as security. Any such bank may make such loans, whether secured by such farm land or such real estate, in an aggregate sum equal to twenty-five per centum of its capital and surplus or to one-third of its time deposits and such banks may continue hereafter as heretofore to receieve time deposits and to pay interest on the same.

"The Federal Reserve Board shall have the power from time to time to add to the list of cities in which national banks shall not be permitted to make loans secured upon real estate in the manner described in this section."

That section twenty-five be, and is hereby, amended to read as follows:

"SEC. 25. Any national banking association possessing a capital and surplus of $1,000,000 or more may file application with the Federal Reserve Board for permission to exercise, upon such conditions and under such regulations as may be prescribed by the said board, either or both of the following powers:

"First. To establish branches in foreign countries or dependencies or insular possessions of the United States for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States.

"Second. To invest an amount not exceeding in the aggregate ten per centum of its paid-in capital stock and surplus in the stock of one or more banks or corporations chartered or incorporated under the laws of the United States or of any State thereof, and principally engaged in international or foreign banking, or banking in a dependency or insular possession of the United States either directly or through the agency, ownership, or control of local institutions in

foreign countries, or in such dependencies or insular possessions.

"Such application shall specify the name and capital of the banking association filing it, the powers applied for, and the place or places where the banking operations proposed are to be carried on. The Federal Reserve Board shall have power to approve or to reject such application in whole or in part if for any reason the granting of such application is deemed inexpedient, and shall also have power from time to time to increase or decrease the number of places where such banking operations may be carried on.

"Every national banking association operating foreign branches shall be required to furnish information concerning the condition of such branches to the Comptroller of the Currency upon demand, and every member bank investing in the capital stock of banks or corporations described under subparagraph two of the first paragraph of this section shall be required to furnish information concerning the condition of such banks or corporations to the Federal Reserve Board upon demand, and the Federal Reserve Board may order special examinations of the said branches, banks, or corporations at such time or times as it may deem best.

"Before any national bank shall be permitted to purchase stock in any such corporation the said corporation shall enter into an agreement or undertaking with the Federal Reserve Board to restrict its operations or conduct its business in such manner or under such limitations and restrictions as the said board may prescribe for the place or places wherein such business is to be conducted. If at any time the Federal Reserve Board shall ascertain that the regulations prescribed by it are not being complied with,

said board is hereby authorized and empowered to institute an investigation of the matter and to send for persons and papers, subpoena witnesses, and administer oaths in order to satisfy itself as to the actual nature of the transactions referred to. Should such investigation result in establishing the failure of the corporation in question, or of the national bank or banks which may be stockholders therein, to comply with the regulations laid down by the said Federal Reserve Board, such national banks may be required to dispose of stock holdings in the said corporation upon reasonable notice.

"Every such national banking association shall conduct the accounts of each foreign branch independently of the accounts of other foreign branches established by it and of its home office, and shall at the end of each fiscal period transfer to its general ledger the profit or loss accrued at each branch as a separate item.

"Any director or other officer, agent, or employee of any member bank may, with the approval of the Federal Reserve Board, be a director or other officer, agent, or employee of any such bank or corporation above mentioned in the capital stock of which such member bank shall have invested as hereinbefore provided, without being subject to the provisions of section eight of the Act approved October fifteenth, nineteen hundred and fourteen, entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.'"

Approved, September 7, 1916.

Section 5202 of the Revised Statutes:

No association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserved profits.

Section 13 of the Federal Reserve Act, ch. 6, Pub. L. No. 63-43, 38 Stat. 251, 263-64 (1913):

CHAP. 6.—An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the short title of this Act shall be the "Federal Reserve Act."

POWERS OF FEDERAL RESERVE BANKS.

SEC. 13. Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money,

national-bank notes, Federal reserve notes, or checks and drafts upon solvent member banks, payable upon presentation; or, solely for exchange purposes, may receive from other Federal reserve deposits of current funds in lawful money, national-bank notes, or checks and drafts upon solvent member or other Federal reserve banks, payable upon presentation.

Upon the endorsement of any of its member banks, with a waiver of demand, notice and protest by such bank, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods, wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a majority at the time of discount of not more than ninety days: *Provided*, That notes, drafts, and bills drawn or issued for agricultural purposes or based on live stock and having a maturity not exceeding six months may be discounted in an amount to be limited to a percentage of the capital of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

Any Federal reserve bank may discount acceptances which are based on the importation or exportation of goods and which have a maturity at time of discount of not more than three months, and indorsed by at least one member bank. The amount of acceptances so discounted shall at no time exceed one-half the paid-up capital stock and surplus of the bank for which the rediscounts are made.

The aggregate of such notes and bills bearing the signature or indorsement of any one person, company, firm, or corporation rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

Section 20 of the War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, 40 Stat. 506, 512:

CHAP. 45.—An Act To provide further for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to provide credits for industries and enterprises in the United States necessary or contributory to the prosecution of the war, and to supervise the issuance of securities, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"SEC. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association or dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

Nos. 92-484, 92-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner,
v.
INDEPENDENT INSURANCE AGENTS OF AMERICA, *et al.*,
Respondents.

STEPHEN L. STEINBRINK,
ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners,
v.
INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the text of the Federal Reserve Act Amendments of 1916, ch. 461, 39 Stat. 752, rebuts the presumption of invalidity created by the omission of Section 92 of the National Bank Act from the U.S. Code, where the punctuation and structure of the 1916 Act indisputably indicates that Section 92 was repealed by Section 20 of the War Finance Corporation Act of 1918, ch. 45, 40 Stat. 512.

2. Whether the Court of Appeals should have addressed the question of Section 92's validity, where the parties disputed whether the court should reach the issue, where all interested parties were given an opportunity to brief and argue the issue, and where the underlying dispute turned on the proper interpretation of Section 92.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-434

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner,

INDEPENDENT INSURANCE AGENTS OF AMERICA, *et al.*,
Respondents.

No. 92-507

STEPHEN L. STEINBRINK,
ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

This brief is submitted by respondents Independent Insurance Agents of America, Inc., Independent Insurance Agents of Oregon, National Association of Life Underwriters, National Association of Professional Insurance Agents, National Association of Surety and Bond Producers, Oregon Association of Life Underwriters, and Oregon Professional Insurance Agents, Inc., in opposition

to the petitions for writ of certiorari filed by the Acting Comptroller of the Currency ("Comptroller"), the Office of the Comptroller of the Currency, and the United States in Case No. 92-507, and by the United States National Bank of Oregon ("Oregon National Bank" or the "Bank") in Case No. 92-484.[1]

STATEMENT OF THE CASE

The Petitions for Certiorari in this case present narrow questions involving application of well-settled principles of federal law. The impact of the decision below is minimal, at most, and this Court's plenary review would not offer any meaningful instruction or direction to lower federal courts. Accordingly, no reason exists for review by this Court.

A. Statutory and Regulatory Framework

To protect the integrity of the banking system, prevent unfair competition, and safeguard the public, national banks and federally-registered bank holding companies are generally prohibited from engaging in the business of insurance. Section 24 of the National Bank Act ("NBA"), 12 U.S.C. § 24(Seventh), which sets forth the powers of national banks, has been consistently interpreted as strictly limiting the permissible insurance activities of national banks. The Bank Holding Company Act ("BHCA") similarly prohibits the general sale of insurance by bank holding companies. 12 U.S.C. § 1843(c)(8).[2]

In 1916, at the behest of then-Comptroller John Skelton Williams, Congress enacted a narrow exception to provide

[1] Pursuant to this Court's Rule 29.1, Respondents state that they have no publicly traded parent companies or subsidiaries.

[2] Section 1843 prohibits bank holding companies from engaging in business not closely related to banking, and subsection (c)(8) makes clear that "it is not closely related to banking or managing or controlling banks for a bank holding company to provide insurance as a principal or broker" except in limited circumstances.

a modicum of financial assistance to "country bank[s]." The exception was codified as Section 92 of the NBA, and provided that a national bank "located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may . . . act as the agent for any fire, life or other insurance company." As Comptroller Williams explained in urging adoption of Section 92, "many banks located in small country communities" had experienced financial difficulties. 53 Cong. Rec. S11001 (daily ed. July 14, 1916). Empowering such country banks to sell insurance would assist these "small national banks" by "provid[ing] them with additional sources of revenue," and would thereby ensure that inhabitants of sparsely populated areas had access to banking services. *Id.*

Comptroller Williams went on to make clear, however, that the authority to sell insurance would be "limited to banks in small communities." *Id.* He also made clear that country banks should be permitted to sell insurance only in their local communities, for then their insurance activities would not be "likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.* He warned that it would be unwise policy to confer a broader power "generally upon banks in the large cities" to sell insurance, and that "it would be unfortunate if any movement should be made in the direction of placing the banks of the country in the category of department stores" offering a variety of banking and nonbanking products. *Id.*

B. The Proceedings Below

Oregon National Bank is a national banking association with its principal place of business in Portland, Oregon. It is anything but a "country bank." In 1990, it was the forty-fourth largest bank in the nation. Its parent bank holding company, U.S. Bancorp, had assets of more than $7.0 billion in 1986. American Banker, Jan. 20, 1987 at 30.

In 1984, the Bank proposed to establish a wholly owned, *de novo* subsidiary for the purpose of offering a full range of insurance products from an office located in a community with a population of less than 5,000. But the Bank did not propose to restrict insurance sales to the environs of that small town. To the contrary, it sought approval for a nationwide insurance business.

In August, 1986, the Comptroller approved Oregon National Bank's proposal. The Comptroller concluded that, pursuant to Section 92, "a national bank or its branch which is located in a place of 5,000 or under population may sell insurance to existing and potential customers *located anywhere*." (OCC Pet. App. 75a) (emphasis added). Respondents challenged the Comptroller's ruling, arguing that Section 92 could not be read to empower a national bank to sell insurance outside the small town in which its office was located.[3]

Echoing a point made by Respondents in their summary judgment briefs, the district court noted that Section 92 "no longer appears in the United States Code," and concluded that the statutory provision "apparently was inadvertently repealed in 1918." (OCC Pet. App. 44a n.2.) Despite this conclusion, the court "assume[d] that the statute exists *in proprio vigore*." *Id.* The district court went on to determine, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), that Congress did not specifically intend to preclude the nationwide sale of insurance from any bank office located in a town of fewer than 5,000 inhabitants, and that the Comptroller's action should therefore be affirmed because it was not inconsistent with the purposes of Section 92.

C. Proceedings Before the Court of Appeals

After briefing and oral argument on the issue, the majority of a panel of the D.C. Circuit reversed, concluding that Section 92 "has been repealed" and "has ceased to exist." (OCC Pet. App. 19a.)[4] In reaching its conclusion, the Court of Appeals carefully examined the text of the relevant statutory provisions, including punctuation, as well as relevant legislative history.

The Court of Appeals first addressed the issue whether it should decide Section 92's validity. The court observed that it is well-recognized that courts must sometimes go beyond the specific legal theories advanced by the parties. (OCC Pet. App. 5a, citing, *Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1718 (1991) ("court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law"); *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415 (1990); *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939)). Observing that Section 92's omission from the U.S. Code gives rise to a statutory presumption of invalidity, 1 U.S.C. § 204(a), the court concluded that it "not only [had] the right to inquire into its validity, [it had] the duty to do so." (OCC Pet. App. 6a.)

The Court of Appeals carefully examined the text of the Statutes at Large to determine whether they rebut the statutory presumption of Section 92's repeal. From the Petitioners' view, the question before the court was

[3] The Oregon National Bank intervened as a defendant.

[4] The Court's ruling could not have been a surprise to the parties or the banking and insurance industries. Prior to oral argument, the Court of Appeals ordered the parties to be prepared to address Section 92's continued existence. There was extensive questioning on the issue during argument on March 1, 1991. Thereafter, in August 1991, the court ordered the parties to submit post-argument briefs addressing two questions: (1) whether the court should address the question of Section 92's validity; and (2) whether Section 92 continues to exist. Although the Comptroller argued, in response, that the Court should not reach the issue, Respondents maintained that the Court *must* resolve the question of Section 92's validity. All these proceedings were public.

whether Congress had made Section 92 a part of Section 13 of the Federal Reserve Act or whether it became part of Section 5202 of the Revised Statutes. Examining the text, including the punctuation, of Pub. L. No. 64-270, 39 Stat. 752, 753 (1916) (the "1916 Act"), the Court of Appeals concluded that, "on its face, the 1916 [Act] had the effect of placing section 92 within section 5202 of the Revised Statutes." (OCC Pet. App. 9a)

The court then turned to the War Finance Corporation Act of 1918, Pub. L. No. 65-121, § 20, 40 Stat. 506, 512 (1918) (the "1918 Act"). The language of the 1918 Act, which states that it *amends* R.S. 5202 "to read as follows," omits the paragraph now known as Section 92. The court explained that "[u]nder traditional rules of statutory construction, the meaning of Section 92's omission is plain; the material omitted on reenactment is deemed repealed." (OCC Pet. App. 9a (citing cases))

After noting that post-1918 views regarding whether Section 92 had been repealed were not unanimous, the Court of Appeals focussed on evidence as to what Congress understood it was doing in recodifying R.S. 5202 in the 1918 Act. The court noted that three extant sources as to current law at the time reported that, as a result of the 1916 Act, Section 92 was part of R.S. 5202, and therefore informed the 1918 Congress that Section 92's exclusion from the amended R.S. 5202 in the 1918 Act would signal its repeal. (OCC Pet. App. 13a) Recognizing that the purpose of the 1918 Act was to assist the financing of the war effort, the court observed that "there is no inherent contradiction between the deletion of section 92 and [that purpose]." (*Id.* 14a)

The court ruled that subsequent treatment of Section 92 by Congress did not determine whether the 1918 Congress had repealed the provision. (*Id.* 15a, citing *Russello v. United States*, 464 U.S. 16, 26 (1983) ("[I]t is well settled that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.")) Further, the court concluded, "[f]ederal agencies have no authority to reinstate a statute that Congress has repealed." And no prior court had found that Section 92 remains valid; at most, they had merely presumed that it does. (OCC Pet. App. 15a-18a)

Finally, the Court of Appeals declined the invitation to rewrite history:

> It is one thing for a court to bend statutory language to make it achieve a clearly stated congressional purpose; it is quite another for a court to reinstate a law that, intentionally or unintentionally, Congress has stricken from the statute books. If the deletion of section 92 was a mistake, it is one for Congress to correct, not the courts.

(*Id.* 19a-20a)[5]

Judge Silberman, dissenting, did not take issue with the majority's conclusion that Section 92 had been repealed. Instead, he disagreed with the court's decision to reach the issue, concluding that Respondents' failure to challenge Section 92's validity was the end of the matter. Judge Silberman did *not* assert that the court was without power to address the issue, but rather that it should have refrained from doing so as matter of "judicial restraint." (*Id.* at 32a) Although representatives from the insurance and banking industries, as well as the government, had participated in the case as parties or *amici* and the court had repeatedly raised the question of Section 92's validity prior to issuing its decision,[6] Judge

[5] Quoting the court's opinion out of context, the Solicitor General suggests that the Court of Appeals concluded that Congress had, in fact, made a mistake when it repealed Section 92. *See* OCC Pet. 7, citing App. 14a. The court drew no such conclusion. To the contrary, it found that it "must conclude that Congress intended the consequences of its actions." (OCC Pet. App. 19a)

[6] The American Bankers Association, a trade association which purports to represent "both national and state-chartered banks located in each of the fifty states and the District of Columbia," participated in the appeal as *amicus curiae*. Brief of the American

Silberman inexplicably seemed concerned that interested parties "had no opportunity to make their views known to the court." (*Id.* 33a).

Petitioners sought rehearing, or rehearing *en banc*, raising the same issues and arguments they repeat here. The full court received briefing on both of the questions presented to this Court. No member of the Court of Appeals voted to reconsider the majority's conclusion that Section 92 had been repealed. Judge Silberman, joined by two other judges, voted to reconsider only whether the court should have reached the question—an issue raised (both at the *en banc* stage and in this Court) by the Bank, but not by the Comptroller. Three judges wrote separately to disagree with Judge Silberman.

REASONS FOR DENYING THE WRITS

The Solicitor General, on behalf of the Comptroller, seeks review of the D.C. Circuit's holding that Section 92 has been repealed. The Oregon National Bank adds a second issue: whether the Court of Appeals should have considered the validity of Section 92. The Solicitor General expressly urges this Court *not* to address this second issue. OCC Pet. 9 n.3. No reason exists for granting certiorari on either question.

1. a. There is no meaningful conflict between the Circuits on the issue of Section 92's continued existence. In *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992) ("*ALTA*") (petitions pending), the Second Circuit unanimously held that national banks are not empowered by the NBA to act as agents for insurance companies in the sale of title insurance. The court ruled

Bankers Association and Oregon Bankers Association as Amici Curiae at 3 (filed Feb. 7, 1991). *See also supra* n.4.

[7] Judge Randolph also wrote separately to express his view that "denials of rehearing *en banc* are best followed by silence. They should not serve as the occasion for an exchange of advisory opinions, overtures to the Supreme Court, or press releases." (OCC Pet. App. 42a)

that Section 92 limits national banks' "incidental powers" under Section 24(Seventh) of the NBA. Without having received briefing or hearing argument on the issue, the Second Circuit, as a preliminary point, *sua sponte* concluded that Section 92 had not been repealed. That conclusion, however, was *dicta*: the court need *not* have resolved the issue of Section 92's continued existence in order to conclude that national banks lack the power to act as agents for title insurance companies.

As the Fifth Circuit has recognized, prior to enactment of Section 92, "no national bank possessed *any* power to act as insurance agents." *Saxon v. Georgia Ass'n of Ind. Ins. Agents*, 399 F.2d 1010, 1016 (5th Cir. 1968) (emphasis in original). By its explicit *addition* to national banks' powers, Section 92 constituted the sole source of authority for national banks to engage in insurance-agency activities.[8] Section 92 was thought necessary precisely for the reason that, as was universally understood, national banks otherwise had neither the express nor incidental power to sell insurance. *See, e.g.*, 53 Cong. Rec. S11001 (daily ed. July 14, 1916) ("[N]ational banks are not given either expressly or by necessary implication the power to act as agents for insurance companies.").[9] Section 92 thus reflects Congress' understanding that insurance powers were beyond the

[8] *See Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."); *National R. Passenger Corp. v. National Ass'n of R. Passengers*, 414 U.S. 453, 458 (1974) (same); *Midland Telecasting v. Midessa Television Co.*, 617 F.2d 1141, 1145 n.7 (5th Cir.) ("The existence of a specific [statutory] exemption covering certain acts is evidence that Congress did not intend to grant immunity to other acts not covered by the explicit exemptions."), *cert. denied*, 449 U.S. 954 (1980).

[9] This view conformed with the opinion of the Board of Governors of the Federal Reserve, which held in 1915 that national banks had no authority, express or implied, to engage in insurance agency activities. The Board ruled that "[a]ny such *extension* of the powers of national banks must be left to the consideration of Congress." 2 Fed. Reg. Bull. 73, 74 (Feb. 1, 1916) (emphasis added).

powers conveyed by the other provisions of the NBA. *See Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. 245, 258 & n.13 (1934) (amendment to NBA to provide limited power to pledge assets to secure deposits "indicates that Congress believed that the original act had not granted general power to pledge assets to secure deposits"). The Second Circuit expressly embraced this understanding of the NBA. *ALTA*, 968 F.2d at 155.

Section 92 is thus the only statutory enactment that has ever addressed the insurance agency powers of national banks. The effect of Congress' repeal of Section 92 is thus plain: there is no longer *any* authority for national banks to sell insurance. The repeal of Section 92 reinforces Congress' intention to deprive national banks of even the limited authority to sell insurance in small towns that it briefly permitted from 1916 to 1918. Congress thus reinstated the law as it existed prior to Section 92's enactment: "no national bank possesse[s] *any* power to act as insurance agents." *Saxon*, 399 F.2d at 1016 (emphasis in original).

This background demonstrates why the Second Circuit's view is *dicta*. Whether or not Section 92 now exists, its enactment in 1916 demonstrates that national banks do not possess any general power to sell insurance, including title insurance. For that reason, there was no necessity for the Second Circuit to decide whether Section 92 had been repealed. And, for this same reason, but contrary to the Comptroller's assertion, the issue of Section 92's existence does *not* have "ramifications" for the *ALTA* decision (OCC Pet. 20): even if this Court were to grant review and determine that the Second Circuit incorrectly ruled on Section 92's continued existence, that determination would not alter the outcome in *ALTA*. *See Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

The lack of any meaningful conflict is demonstrated by the fact that the Second Circuit's *dicta* and the D.C. Circuit's ruling below do not create conflicting obligations or rights for any entity. The D.C. Circuit held that Section 92 no longer exists. Because the Comptroller had cited no other authority for its challenged ruling, the Court of Appeals concluded that the agency's ruling was not in accordance with law. (OCC Pet. App. 20a) That is, the D.C. Circuit held that the Comptroller cannot invoke Section 92 as a source of authority to permit national banks to sell insurance from "small towns." By contrast, the *ALTA* decision presents and addresses only the narrow issue of national banks' authority to sell title insurance without regard to their geographic location. The Second Circuit held that the Comptroller cannot invoke Section 24(Seventh) as a source of authority to permit national banks to sell title insurance from offices that are not located in small towns. The *ALTA* court did *not* give any instruction as to the use or application of Section 92. Thus, neither the Comptroller, the Bank, nor any other entity is subject to conflicting directives from or accorded different rights by the two courts.

Moreover, the Second Circuit and D.C. Circuit actually *agree* on the one issue Petitioners contend controls: whether Section 92 was placed in Section 5202 of the Revised Statutes in 1916 (in which case it was repealed in 1918) or whether it was placed in Section 13 of the Federal Reserve Act. (OCC Pet. 11, Bank Pet. 11)[10] The D.C. Circuit, as noted, held that Section 92 *was* part of R.S. 5202 and therefore was repealed by the 1918 Act. The Second Circuit also concluded that "Congress enacted Section 92 as part of Section 5202 of the Revised Statutes." (Bank Pet. at 18 n.24, citing *ALTA*, 968 F.2d at 151) The two Circuits thus agree on the controlling question presented to this Court by Petitioners.

The Second Circuit went on to conclude, contrary to the view of all of the parties here, that the 1916 version

[10] According to Petitioners, if Section 92 was not part of R.S. 5202, there was no repeal in the 1918 Act. *Id.*

of Section 5202 somehow survived its amendment and recodification in 1918. The fact that even the Petitioners cannot support such erroneous *dicta* merely underscores the conclusion that the Second Circuit's review of Section 92 is an aberrant departure from settled legal principles that lacks any concrete effect.[11]

b. Without any meaningful conflict, Petitioners resort to asking this Court to sit as a court of error and correct what they view to be the D.C. Circuit's erroneous decision. Not only have they miscast the role of this Court, *see Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), but this case does not warrant this Court's attention: the legal issues presented are arcane and the case does not have any significant impact on the banking or insurance industry. Moreover, Petitioners' arguments lack merit. The text of the relevant Statutes at Large—including its punctuation—demonstrates that the 1918 Congress repealed Section 92. Nothing in the legislative history negates this conclusion, and subsequent actions have not revived the dead statute.

As noted above, the Petitioners expressly disavow the Second Circuit's reasoning in *ALTA*. (OCC Pet. 11; Bank Pet. 18 n.24) Instead, they fashion a new argument for Section 92's existence—an argument that *no* judge has accepted, and that did not persuade the D.C. Circuit, sitting *en banc*, of the need ever to give the panel's decision a second look.

Petitioners do not contest the Court of Appeals' determination that Section 92's absence from the U.S. Code creates a presumption that the statutory provision no

[11] Petitioners note that a district court in Kentucky has adopted the Second Circuit's *dicta*. *See Owensboro Nat'l Bank v. Moore*, No. 91-3 (E.D. Ky. Aug. 4, 1992) (appeals pending). But that case is no cause for granting review here. The question of Section 92's validity is one of the issues raised on appeal and the Sixth Circuit may agree with the D.C. Circuit's holding in this case. If anything, the existence of the Sixth Circuit litigation is an additional reason why action of this Court is not now required.

longer exists. *See United States v. Bergh*, 352 U.S. 40, 47 (1956) (exclusion of statutory provision from Code is evidence of repeal). Congress itself has directed that the U.S. Code "establishe[s] prima facie the laws of the United States." 1 U.S.C. 204(a). Nor do Petitioners argue that the court incorrectly looked to the Statutes at Large to determine whether they contradict the U.S. Code.[12] Rather, they contend that the court misconstrued the evidence to be gleaned from the Statutes at Large. This is not the proper time or place to argue fully the merits of the case, but several of Petitioners' arguments warrant response.

First, as the Solicitor General concedes, the punctuation of the Statutes at Large unambiguously indicates that Section 92 was part of R.S. 5202 and was repealed in 1918.[13] (OCC Pet. 11) Nevertheless, Petitioners argue that the punctuation of the Statutes at Large should be ignored in favor of what they believe to be the contrary import of the "text" of the 1916 Act. But the text will not bear the strained reading Petitioners would force upon it. In fact, the text is consistent with the reading necessarily drawn from the punctuation.

Second, Petitioners make much of the fact that the paragraph preceding Section 92 in the 1916 Act relates to "acceptances authorized by *this Act*," 39 Stat. 753 (emphasis added), asserting that it must mean the Federal Reserve Act and not R.S. 5202. This construction, according to Petitioners, suggests that the 1916 Act placed the paragraph preceding Section 92 (and therefore Sec-

[12] Congress has stipulated that "[t]he United States Statutes at Large shall be legal evidence of laws . . . in all the courts of the United States." 1 U.S.C. § 112. *See United States v. Welden*, 377 U.S. 95, 98 n.4 (1964).

[13] The Court of Appeals' analysis of the punctuation and the statutory phrase "amended to read as follows" in the 1918 Act is precisely the same as the analysis employed by this Court in *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 (1958). *Compare Vance v. Safeway Stores*, 239 F.2d 144, 146 (10th Cir. 1956), *rev'd* 355 U.S. 389 (1958) (relying on *Nashville Milk*).

tion 92 itself) in the Federal Reserve Act and not in R.S. 5202. They seek support for this conclusion in the paragraph that clearly pertains to R.S. 5202 (indeed, restates R.S. 5202 as it existed at the time), which cross-references the "Federal Reserve Act." According to Petitioners, this cross-reference means that this first paragraph alone was meant to be in R.S. 5202, whereas the following paragraphs (including Section 92) were meant to be part of Section 13. (*See* OCC Pet. 11-13; Bank Pet. 11-13)

But that first paragraph's explicit identification of the Federal Reserve Act explains why Congress could use the phrase "this Act" in the next paragraph to refer to the Act just named—*i.e.*, the Federal Reserve Act. Because the "Federal Reserve Act" was mentioned in the first paragraph, the use of the phrase "this Act" in the next paragraph could serve simply as an antecedent reference. There would be no confusion in the text as it appeared in R.S. 5202: "this Act" refers to the previously identified Federal Reserve Act, just as Petitioners contend it must.[14]

There is, of course, another possible explanation Petitioners ignore. The phrase "this Act" in the paragraph preceding Section 92 may refer to nothing other than the 1916 Act itself.[15] If that was Congress' intent, then the reference to "this Act" has no relevance to where the paragraph was meant to be inserted. Wherever it was inserted—in R.S. 5202 or the Federal Reserve Act or any

[14] The Solicitor General wrongly argues that Congress would have to use the phrase "that Act" to refer to the previously mentioned Federal Reserve Act. OCC Pet. 13 n.6. In fact, the word "this" would correctly refer to the prior reference. "This" means "the . . . thing, or idea . . . that has just been mentioned." Webster's Ninth New Collegiate Dictionary 1227 (ed. 1988). That the Solicitor General's argument turns on the difference between "this" and "that" highlights the paucity of Petitioners' contention that the text rebuts the presumption of Section 92's repeal.

[15] The paragraph preceding Section 92 refers to "acceptances authorized by this Act." The 1916 Act revised the acceptances authorized pursuant to the Federal Reserve Act of 1913, Pub. L. No. 63-43 § 13, 38 Stat. 251 ("1913 Act").

other statute—"this Act" would simply refer back to the 1916 Act, Pub. L. No. 64-270. It would still accomplish the same referentional significance Petitioners contend it must.

Third, Petitioners' reading of the text does violence to the express statutory language. In the 1916 Act Congress stated, in no uncertain terms, that "Section [5202] of the Revised Statutes of the United States is hereby amended to read as follows." Yet, according to Petitioners, Congress simply restated R.S. 5202 as it existed pursuant to the 1913 Act. *See* OCC Pet. 13 n.7 (arguing that the title "nowhere suggests that the [1916 Act] was adding matter to Rev. Stat. § 5202").[16] That reading, which requires that the express instruction given by Congress (that R.S. 5202 is "amended") be entirely ignored, violates the most fundamental tenets of statutory construction. *E.g.*, *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). The text demonstrates that the 1916 Congress *did* amend R.S. 5202, in part, by adding Section 92.

Fourth, the structure of the 1916 Act—which Petitioners ignore—further supports the conclusion that Congress made Section 92 part of R.S. 5202. There are several introductory sentences within the 1916 Act that unquestionably were not intended to become positive law. Instead, they act as signposts, explaining where the 1916 amendments are to be inserted in previously-existing law. As they appear in text, these introductory phrases are as follows (numbering is added):

> (1) At the end of section eleven insert a new clause as follows: . . .
>
> (2) That section thirteen be, and is hereby, amended to read as follows: . . .

[16] "That the heading of [statute] fails to refer to all the matters which the framers of that section wrote into text is not an unusual fact." *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947). The title cannot override "the detailed provisions of the text." *Id.*

(3) Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: . . .

(4) That subsection (e) of section fourteen, be, and is hereby, amended to read as follows: . . .

The language of Section 92 comes after (3), addressing amendments to R.S. 5202, and precedes (4), the next introductory phrase.

In sum, the text, even without quotation marks, demonstrates that Section 92 was enacted as part of R.S. 5202. The quotation marks, as they appear in the Statutes at Large, simply clarify the meaning of these introductory phrases.[17]

c. Contrary to Petitioners' suggestions, the Court of Appeals was the first court to address the issue of Section 92's existence. *See* Bank Pet. 9. Courts—including this Court—have, at most, noted Section 92's absence

[17] At the time Congress enacted the 1918 Act, *every* extant source for current statute law that has been identified included Section 92 in Section 5202 of the Revised Statutes. Petitioners note that the court overlooked one source of current banking law that presumably was available to Congress in 1918—the Comptroller compilation entitled "The National Bank Act as Amended, the Federal Reserve Act, and Other Laws Relating to National Banks," published by the Senate Committee on Banking and Currency. The Comptroller compilation twice set forth the text of Section 92. *First*, the text was unequivocally placed in Section 5202. S. Doc. No. 412, 64th Cong., 1st Sess. 83-84 (1917). *Second*, the compilation reproduced the language of the 1916 Act, containing both Section 13 and Section 5202. *Id.* at 136-37. Thus, no matter which section of the compilation a congressional representative consulted, he or she would have seen Section 92 as part of R.S. 5202. And any ambiguity about the placement of Section 92 in the second reference would be settled by the precision of the first reference.

Petitioners incorrectly contend that the Federal Reserve Board's 1917 compilation of banking statutes set forth Section 92 as part of the Federal Reserve Act. The *Third Annual Report of the Federal Reserve Board* simply restated the 1916 Act, including quotation marks, as it appears in the Statutes at Large. Therefore, like the text of the Statutes at Large, it places Section 92 within R.S. 5202.

from the U.S. Code, but simply "assumed" its existence, avoiding resolution of the issue. *Commissioner of Internal Revenue v. First Sec. Bank*, 405 U.S. 394, 401-02 & n.12 (1972); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1261 & n.6 (5th Cir. 1980); *Commissioner of Internal Revenue v. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966). Other courts appear to have implicitly assumed it exists. *E.g.*, *Independent Ins. Agents of Am., Inc. v. Board of Governors*, 736 F.2d 468, 467-77 (8th Cir. 1984); *Independent Ins. Agents of Am., Inc. v. Board of Governors*, 835 F.2d 1452, 1456 n.8 (D.C. Cir. 1987). Petitioners do not assert that any of these courts would have decided the cases before them differently had they not made this assumption. Indeed, as the Court of Appeals correctly determined, the Court's decision in *Commissioner v. First Sec. Bank*, "did not depend on the statute's continued validity" (OCC Pet. App. 16a), and "[a] determination of the validity of section 92 was not necessary to its decision." (*Id.* 18a) Thus, the D.C. Circuit's ruling has no implications for this Court's previous ruling.

Moreover, Petitioners overstate the concurrence with their position. *See* Bank Pet. 9. The actions of subsequent Congresses have suggested that they were of mixed views—or ambivalent—as to whether Section 92 was repealed in 1918. Consistent with the Court of Appeals' analysis, Congressman Patman, a member (and future Chairman) of the House Banking Committee, argued in 1957 that Section 92 had been repealed.[18] This prompted submissions to the Committee from the Comptroller, general counsel of the Committee, and the Library of Congress' Legislative Reference Service.[19] After receiving these views, however, the House Committee offered no

[18] *Financial Institutions Act of 1957, Hearings Before the Comm. on Banking and Currency, House of Representatives, on S. 1451 and H.R. 7206*, 85th Cong., 2d Sess. 989-90, 1060-63 (1958).

[19] *Id.* at 1036-40, 1063-71.

judgment on Section 92's validity.[20] Seven years later, the staff of a House Banking subcommittee reached the conclusion that "Section 92 is non-existent."[21] In 1988, the Senate passed a bill amending the NBA and including a new section that would have duplicated Section 92 with more explicit limitations. But the bill made no reference to Section 92 or provision for its amendment, replacement or repeal, thus suggesting the view that Section 92 was not in effect.[22]

Of course, these later Congresses could not reinstate a statute repealed by a prior Congress without positively enacting it into law. As Judge Sentelle correctly observed:

> The passage of time, the acquiescence of the parties, the assumptions of officials, even all taken together cannot enact a statute. Legislation only comes into existence through bicameral congressional enactment and presentment to the President of the United States. . . .

OCC Pet. App. 37a (concurring in denial of rehearing *en banc*). No post-1918 Congress reenacted Section 92.

d. The Court of Appeals' decision does not present an issue of such substantial practical importance to the nation's banking or insurance industry to warrant this Court's review. Its real practical impact will be felt by few, if any, national banks and, even then, most such banks will have an easily available alternative means through which to sell insurance in small towns.

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[20] *See id.* at 1090, 1199.

[21] *Consolidation of Bank Examining and Supervisory Functions, 1965: Hearings on H.R. 107 and H.R. 6885 before the Comm. on Banking and Currency of the House of Representatives, Subcomm. on Bank Supervision and Insurance*, 89th Cong., 1st Sess. 3, 391 (1965).

[22] The Proxmire Financial Modernization Act of 1988, Section 513B, reprinted in 134 Cong. Rec. S3541 (daily ed. March 31, 1988).

First, relatively few national banks *could* actually be affected by the court's decision. No one has offered a firm number of the national banks selling general insurance pursuant to Section 92. What numbers have been proffered have been *decreasing* dramatically. The American Bankers Association ("ABA") represented before the Court of Appeals that there were some 160 national banks; and the Comptroller estimated that there were 179 earlier this year. *See* OCC Pet. 19 n.11; Bank Pet. 10. Now, the Comptroller maintains that the number is between 90 and 100. OCC Pet. 19 n.11. None of these numbers has been substantiated. Even taking the unsupported figures at face value, the percentage of national banks using Section 92 is extremely small—between 2.6 and 4.1 percent.[23] According to the ABA, they operate in only sixteen States.[24] And there has never been any allegation, let alone showing, that insurance represents a significant source of income for any of these banks.

Second, a great majority of the few potentially affected national banks have an easy alternative at hand; indeed, some may not be relying on Section 92 for their insurance-agency activities at all. Many national banks—including the Oregon National Bank and the three national bank plaintiffs in *Owensboro*—are owned by bank holding companies and the remaining have the power to form a bank holding company.[25] A bank holding com-

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[23] *See* Thompson Bank Directory 15 (Jan.-June 1992) (number of national banks in United States is 3,888). Thompson Financial Publishing is the official numbering agent for the American Bankers Association.

[24] Appellants' Opposition to Appellees' Petitions for Rehearing and Suggestions for Rehearing En Banc, Exhibit 1 (filed April 20, 1992).

[25] Thompson Bank Directory 15, 154 (8,288 of 12,447 banks are part of holding company structures). Every State has resident bank holding companies. *Id.*

pany is enpowered to operate a nonbanking subsidiary that sells insurance in a small town with a population not exceeding 5,000, so long as state law concurs. 12 U.S.C. §§ 1843(c)(8)(C)(i), 1846. According to the ABA's own figures, most, if not all, of the national banks that are purportedly using Section 92 are located in States where the small-town provision of the BHCA can be used.[26] The Comptroller while noting that Respondents made this point in successfully opposing *en banc* rehearing, does not disagree that the BHCA is an easily accessible alternative source of small-town insurance-agency activity for national banks, including those currently selling general insurance. OCC Pet. 19 n.12.[27]

Third, the Bank's—but notably *not* the Solicitor General's—reliance on state "parity" or "wild card" statutes is inappropriate. Bank Pet. 10. These statutory provisions may demonstrate nothing more than a desire to ensure that state banks have competitive equality with national banks, in which case the disappearance of Section

[26] There is a difference between the BHCA small-town provision and Section 92 as interpreted by the Comptroller. The BHCA permits the sale of insurance only to customers located in small town and its environs. *See First United Bancshares, Inc.*, 73 Fed. Res. Bull. 162 (1987). Section 92, on the other hand, has been interpreted by the Comptroller to allow the sale of insurance to customers located anywhere. It is this disparity that triggered the instant litigation. It is significant to note, however, that no evidence has been presented in this case that any bank other than Oregon National Bank is engaged in geographically widespread sales through use of Section 92.

[27] Even without the BHCA, these banks are not left without some prospect of alternative federal source of insurance-agency authority. For example, the Comptroller has interpreted Section 24(Seventh) of the NBA to permit national banks to insure the issuance of municipal bonds on the grounds that the activity is functionally "within the business of banking." *E.g., American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988). In addition, the Comptroller has permitted national banks to enter into other arrangements with insurance agencies, such as leasing bank lobby space. The permissibility of such rulings is, of course, not before this Court.

92 would not infringe upon any state goal. In any event, it is within the easy power of state legislatures, or perhaps even state regulators, to create their own small-town exemption if they wish to ensure continuation of such activity by their state-chartered banks. Indeed, a number of States have done just that.[28]

The Bank asserts only that the decision below "calls into question" (Bank Pet. 8) or "creates considerable uncertainty over the propriety of" banks' small-town insurance agency activities (Bank Pet. 10). The Solicitor General contends only that the decision "does violence to the settled expectations of those banks that currently sell insurance under Section 92." OCC Pet. 19. Noticeably absent from either Petition is an assertion that the decision will require national banks to cease this insurance agency activity. Petitioners cannot have it both ways: either the decision below forces national banks to cease their sale of general insurance or it has no practical impact.

e. This case presents an extremely unusual question of statutory construction. It is highly unlikely that any court will again face a circumstance in which a statute has been eliminated from the U.S. Code; the original statutory text (including its punctuation) and subsequent congressional action indicate that the statute was repealed; but it has nonetheless been assumed (at least by some), without the issue having been decided, that the statute continues to exist. It is highly unlikely therefore that this Court's exercise in following the trail of quotation marks Petitioners lay and parsing the textual

[28] *E.g.*, N.M. Stat. Ann. § 59A-12-10A(2)(1991); Wash. Rev. Code § 30.08.140(10) (1990); Colo. Rev. Stat. § 10-2-211(2)(b) (1991). This option is particularly attractive in these circumstances because, by the APA's reckoning, 105 of the 115 specifically identified state banks are located in just one State, which could solve this "problem" on its own. *See* n.24 *supra*.

nuances of "this" versus "that," as Petitioners urge, would offer any meaningful instruction or direction to other courts.[29]

If the decision is incorrect and if the decision proves to have a substantial negative impact on the banking and/or insurance industries in the future, Congress is free to address the matter. The proper branch of government to fill gaps created by repeals—whether inadvertent or not—is the legislative branch. *See, e.g., Whitney v. State Tax Comm'n*, 309 U.S. 530, 535-37 (1940); *United States v. Riker*, 670 F.2d 987, 988 (11th Cir. 1982) (Congress closed "loophole" created by earlier "inadvertent[] repeal"). If the deletion of Section 92 was a "mistake," it is for Congress—not the courts—to correct. *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 364-65 (1986).

2. Petitioner Oregon National Bank stands alone in asking this Court to review whether the Court of Appeals should have addressed the question of Section 92's validity. But the Bank has pointed to no decision in conflict with the opinion below, and none exists. Nor does this case present any important or unresolved question of federal law relevant to this issue.

Contrary to the Bank's contention, the Court of Appeals' determination of the validity of Section 92 was anything but "*sua sponte*." Bank Pet. 9 n.10. The district court noted Section 92's omission from the U.S. Code and concluded that the statutory provision "apparently was inadvertently repealed in 1918." (OCC Pet. App. 44a n.2) Despite this conclusion, the court "assume[d] that the statute exists *in proprio vigore*." (*Id.*) Respondents noted these facts in their opening brief to

[29] Even if this Court were to grant review, there is an alternative ground for affirming the Court of Appeals' decision. Respondents argued below that the Comptroller's expansive geographic interpretation of Section 92 was arbitrary and capricious and not in accordance with law. *See supra* at 4.

the Court of Appeals. Moreover, Respondents specifically asked the Court to confront the issue of Section 92's validity. Petitioners expressly disagreed that the court should decide this issue. *See supra* n.4. Consequently, contrary to the Bank's assertion, there was a direct dispute as to whether the Court of Appeals should address the question of Section 92's validity. Having resolved this dispute in favor of addressing Section 92's validity,[30] it is difficult to perceive how the court's decision that Section 92 is not valid was "advisory."

The Bank, like Judge Silberman, relies chiefly on cases in which courts had declined to resolve issues that had not been fully briefed or argued. *See, e.g., Carducci v. Regan*, 714 F.2d 171, 172 (D.C. Cir. 1983) ("Because it was not adequately briefed or argued on appeal, we decline to resolve the further issue . . ."); *McCormick v. United States*, 111 S. Ct. 1807, 1818 (1991) (Scalia, J., concurring) ("While I do not feel justified in adopting that interpretation without briefing and argument . . . ."); *King v. Palmer*, 778 F.2d 878, 883 (D.C. Cir. 1986) (declining to rehear *en banc* issue that "was not briefed or argued to the panel"). *See also Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (declining to resolve an issue where "[the] petitioner has never been heard in any way on the merits").[31]

[30] At that point, the fact that the parties did not take directly adversary positions on the substantive issue was irrelevant: federal courts "are not bound to accept, as controlling, stipulations as to questions of law." *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U.S. 39, 51 (1939). *Accord Kamen v. Kemper Financial Services, Inc.*, 111 S.Ct. 1711 (1991).

[31] The Bank's reliance on *Williams v. Zbaraz*, 448 U.S. 358, 367 (1980), is misplaced. In that case, this Court held, unremarkably, that an action attacking the validity of a state statute did not permit a federal court to rule on the constitutionality of a federal statute, although the subject matter of the two statutes was similar. Here, only one statute—a federal statute—is in controversy. The Court of Appeals did not reach out to address any other statutory provision.

But the Court of Appeals had ample opportunity to receive, and interested parties ample time to submit, legal briefing on the existence of Section 92. *See supra* n.4. By the time the panel issued its opinion, the issue had been noted by the district court, briefed by the parties, and discussed at oral argument.[32] Thus, to the extent judicial discretion is involved, it has been exercised correctly to determine whether Section 92 remains in existence. *See Arcadia, Ohio v. Ohio Power Co.*, 111 S.Ct. 415, 418 (1990). And, as the Bank apparently fails to recognize, the existence of this predicate issue counsels against plenary review. This Court's scarce resources would be wasted by taking this case in order to confront a question of whether a lower court correctly exercised discretion that it unquestionably possesses.

CONCLUSION

For all the foregoing reasons, the petitions for writ of certiorari should be denied.

Respectfully submitted,

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November, 1992___

[32] Any defect was surely resolved during the proceedings before the full Court of Appeals. Petitioners filed additional briefs and an *amicus* brief was joined by fifteen banking associations representing bankers across the nation.

No. 92-484

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In this case, the court of appeals held that Section 92 of the National Bank Act, which authorizes national banks "located and doing business" in places of 5,000 or fewer inhabitants to act as the agent for "any fire, life or other insurance company," no longer remains in force. Pet. App. 17a. In our petition, we demonstrated that the court of appeals has ignored statutory language and overlooked pertinent aspects of the legislative record. As a result, the court's erroneous interpretation calls into question widespread and substantial national and state bank insurance activities that Section 92 has engendered over the past seventy-five years. Moreover, we pointed out that the court of appeals' decision conflicts squarely with the Second Circuit's decision in *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (1992), *petitions for cert.*

pending (Nos. 92-482 & 92-645).[1] Finally, we showed that the court of appeals reached out to nullify Section 92 by creating a controversy of its own making.

In response, respondents seek to minimize the importance of the substantial issues presented, the waywardness of the court of appeals' decision, and the sharpness of the conflict among the circuits. Respondents' efforts fall far short of the mark.

1. Respondents contend (Br. in Opp. 8) that there is "no meaningful conflict" between the decision below and the Second Circuit's decision in *American Land Title Ass'n v. Clarke*, because the continued existence of Section 92 was not a necessary component of the Second Circuit's decision. *See* Br. in Opp. 8-10. As the Second Circuit stated at the outset, "[t]he issue in this appeal is whether two provisions of the National Bank Act, 12 U.S.C. §§ 92 and 24 (Seventh) (1988), permit national banks to engage in the title insurance agency business." *American Land Title Ass'n v. Clarke*, 968 F.2d at 150-51. In resolving that issue, the court of appeals first held, "[c]ontrary to the view of the D.C. Circuit," that the omission of Section 92 from the 1918 War Finance Corporation Act was "inadvertent" and did not "effect[] a repeal of section 92." 968 F.2d at 152. Th court then proceeded to hold that Section 92 impliedly prohibits "national banks located and doing business in towns with *over* 5,000 inhabitants from engaging in the insurance agency business," including the sale of title insurance. 968 F.2d at 156 (emphasis in original). Because the court concluded that Section 92 was a limitation on national bank authority, it saw "no need to determine the scope of section 24 (Seventh)," the provision authorizing national banks to engage in activities "incidental" to the "business of banking." 968 F.2d at 157.

[1] The Solicitor General, on behalf of the Acting Comptroller of the Currency, has also sought review of the decision below and has echoed these points. *See* U.S. Pet., No. 92-507, at 8-21.

By its terms, the Second Circuit's decision conflicts squarely with the decision below regarding the existence of Section 92—a fact recognized by the Solicitor General and others.[2] Contrary to respondents' assertion, the Second Circuit's judgment that Chase Manhattan may not sell title insurance was grounded in its holding that Section 92 exists as a limitation on national bank activities.[3] The conflict between the Second Circuit's decision and the decision below is therefore manifest.

Respondents seek to wish away that evident conflict by suggesting that "there was no necessity for the Second Circuit to decide whether Section 92 had been repealed" because "[Section 92's] enactment in 1916 demonstrates that national banks do not possess any power to sell insurance." Br. in Opp. 10. Apart from the dubious merit of such an argument, *see, e.g.*, U.S. Pet., No. 92-645, at 9-18, that argument fails to come to grips with the Second Circuit's judgment.[4] Respondents' effort at revi-

[2] *See* U.S. Pet., No. 92-507, at 8-10; American Bankers Association Br. 4-5; Kentucky Bankers Association Br. 6, 8; American Bankers Association Br., No. 92-507, at 4-5; Kentucky Bankers Association Br., No. 92-507, at 6, 8; *see also* U.S. Pet., No. 92-645, at 9; Chase Br. in Opp., Nos. 92-482 & 92-645, at 9-10; American Bankers Association Br., No. 92-482, at 3-4; American Bankers Association Br., No. 92-645, at 3-4.

[3] *See Black v. Cutter Lab.*, 351 U.S. 292, 297-98 (1956) ("This Court . . . reviews judgments, not statements in opinions."). For that reason, and contrary to respondents' suggestion (Br. in Opp. 11), it is immaterial that petitioner and the Solicitor General each take issue with one aspect of the statutory analysis embraced by both the decision below and the Second Circuit, namely, that Congress enacted Section 92 as part of Section 5202 of the Revised Statutes.

[4] Respondents thus err in suggesting (Br. in Opp. 10) that the Second Circuit's judgment would not be altered if, contrary to our contention, Section 92 has been repealed. *See* U.S. Pet., No. 92-645, at 19 n.2.

Respondents also err by asserting (Br. in Opp. 22 n.29) that the decision below may be affirmed on the alternative ground that the

sionism cannot obscure the square conflict over the existence of Section 92 that warrants this Court's review.

2. Respondents also contend (Br. in Opp. 18-21) that there is no need to determine whether Section 92 remains in force because that issue is of limited practical importance. First, respondents conveniently ignore the fact that, as matters now stand, the substantial national and state bank insurance activities engendered by Section 92 are called into question.[5] Respondents assert that "relatively few national banks *could* actually be affected by the court's decision," by suggesting that "[n]o one has offered a firm number of the national banks selling general insurance pursuant to Section 92." Br. in Opp. 19. The fact that the number of banks engaged in insurance activities comprises a relatively small percentage of the total number of national and state banks does not diminish the significance of these activities. The insurance activities at stake—as evidenced by the vigorous opposition of insurance trade associations in this case and elsewhere—are substantial.

Second, respondents argue (Br. in Opp. 19-20) that the issue presented is insubstantial because a parallel provision of the Bank Holding Company Act ("BHCA"), 12 U.S.C. § 1843(c)(8)(C)(i), permits bank holding companies to sell insurance through subsidiaries in towns with 5,000 or fewer inhabitants. That statutory author-

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Comptroller's initial decision in this case was erroneous. The court of appeals had no occasion to address that question, and this Court does not ordinarily consider questions not specifically passed upon by the court below. *See, e.g., Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *G.D. Searle & Co.* v. *Cohn*, 455 U.S. 404, 414 (1982).

[5] *See* Pet. 10 & n.13; American Bankers Association Br. 1-4; Kentucky Bankers Association Br. 9; American Bankers Association Br., No. 92-507, at 1-4; Kentucky Bankers Association Br., No. 92-507, at 9; *see also* U.S. Pet., No. 92-507, at 19 n.11 ("Whatever the exact figure, it is clear that a significant number of national banks currently engage in activities authorized by Section 92.").

ity is no substitute for Section 92. As respondents acknowledge in passing, "[t]he BHCA permits the sale of insurance only to customers located in [a] small town and its environs," whereas Section 92—as long construed by the Comptroller—does not contain a geographical limitation on customers. Br. in Opp. 20 n.26. In any event, a bank would not have to form a bank holding company if Section 92 remained good law.[6]

Third, respondents neglect to mention the fact that the insurance industry and private litigants are currently wielding the D.C. Circuit's holding that Section 92 has been repealed as a sword against the Comptroller's approval—and ongoing regulation—of national bank insurance activities.[7]

Finally, the issue of Section 92's existence is not a parochial concern only for bank regulators. As has been previously pointed out, that issue affects legal matters that extend beyond the limited question of whether certain national banks may sell insurance.[8] Thus, respondents' statement that other courts—including this Court—over the years have "simply 'assumed'" Section 92's existence is beside the point. Br. in Opp. 17.[9]

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[6] Respondents suggest that, even apart from the BHCA, banks may have "some prospect of alternative federal sources of insurance-agency authority," citing interpretive rulings issued by the Comptroller. Br. in Opp. 20 n.27. In view of the litigation pending before the Court in *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (1992), *petitions for cert. pending* (Nos. 92-482 & 92-645), and respondents' submission attacking the Comptroller's ruling at issue there, *see* Independent Insurance Agents of America, Inc. Br., Nos. 92-482 & 92-485, at 12-19, respondents' suggestion rings hollow.

[7] *See, e.g.*, American Bankers Association Br. 8 & n.2; Kentucky Bankers Association Br. 12-13.

[8] *See* U.S. Pet., No. 92-507, at 20-21; Pet. 9 & n.11.

[9] In view of the square conflict and the significance of the issue presented, respondents err in suggesting (Br. in Opp. 12 n.11) that further review is not warranted because that issue is currently

3. Turning to the merits of the court of appeals' decision, respondents contend that "the text [of the 1916 Act] will not bear the strained reading Petitioners would force upon it." Br. in Opp. 13. At the outset, it bears emphasis that respondents—like the court below—offer no plausible basis for assuming that Congress, by enacting the War Finance Corporation Act in 1918, had any intention of repealing the national bank insurance authority it had adopted two years before. *See American Land Title Ass'n v. Clarke*, 968 F.2d at 151-54. Moreover, a close look at the 1916 enactment refutes respondents' position.

The paragraph of the 1916 enactment immediately preceding the reference to Section 5202 (that concerning Federal reserve bank advances to member banks (paragraph 6)), and the paragraph of the 1916 enactment immediately preceding the reference to the Section 92 provision (that concerning Federal reserve bank rediscounts of bills and acceptances (paragraph 8)), each expressly refers to "this Act," *i.e.*, the Federal Reserve Act. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753; Pet. App. 69a-70a.

By contrast, the Section 5202 reference in the 1916 enactment (paragraph 7)—which appears before the paragraph containing what became Section 92 (paragraph 9)—concludes with a cross-reference to "the Federal reserve Act." This specific reference thereby demonstrates that the paragraph identified as "Fifth" marks the end of the Section 5202 reference. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753; Pet. App. 70a.

Respondents argue that the reference to "this Act" in the paragraphs preceding the references to Section 5202

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pending before the Sixth Circuit. *See Owensboro Nat'l Bank v. Moore*, No. 91-3 (E.D. Ky. Aug. 4, 1992), *appeals pending*, Nos. 92-6330 & 92-6331 (6th Cir.). Such pending litigation calls for this Court to step in now to resolve the uncertainty.

and Section 92 in the 1916 enactment "could serve simply as an antecedent reference" to the Federal Reserve Act. Br. in Opp. 14. That argument ignores the components of the 1916 enactment, namely, the precise language of the 1913 Act which had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 80a. That amendment to Section 5202 of the Revised Statutes, by necessity, referred to the "Federal Reserve Act." Pet. App. 80a. By contrast, the concluding paragraph of the 1913 Act, which concerned Federal reserve bank rediscounts of bills and acceptances, referred expressly to "this Act," namely, the Federal Reserve Act. *See* Pet. App. 80a. That concluding paragraph, which was obviously part of the Federal Reserve Act, appears in the 1916 enactment immediately preceeding the reference to Section 92. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752; Pet. App. 70 (paragraph 8). Respondents' "antecedent reference" theory therefore breaks down. The reference to "this Act" in the rediscount provision (paragraph 8)—a part of the Federal Reserve Act—confirms that the Section 5202 reference had ended.[10]

Respondents also assert that "the phrase 'this Act' in the paragraph preceding Section 92 may refer to nothing other than the 1916 Act itself." Br. in Opp. 14. That argument fails because the reference to "this Act" in the 1916 enactment appears verbatim in Section 13 of the Federal Reserve Act of 1913. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 80a. In other words, Congress was plainly referring to the original Federal Reserve Act—not the 1916 enactment itself.

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[10] For that reason as well, respondents doubly err in asserting that "the structure of the 1916 Act—which Petitioners ignore—furth resupports the conclusion that Congress made Section 92 part of R.S. 5202." Br. in Opp. 15.

Respondents contend that the construction outlined above "does violence to express statutory language" because it requires the Court to ignore the prefatory language that Section 5202 " 'is hereby amended [so] as to read as follows." Br. in Opp. 15; *see* Pet. App. 70a. That prefactory language appears in Section 13 of the 1913 Act, where Congress had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 79a-80a. In order to amend Section 13 in 1916, Congress restated that provision of the Federal Reserve Act in its entirety. In so doing, the 1916 Act restated verbatim a portion of the 1913 Act that referred to amending Section 5202, but the 1916 Act did not change the 1913 amendment. *See* Pet. App. 70a, 79a-80a. Respondents' argument simply has basis other than the placement of the quotation marks. In view of the drafting history surrounding that inadvertently placed punctuation, *see* Pet. 14-16, which respondents ignore, and in light of Congress's actions described above, that argument is makeweight.

In sum, it is apparent that this is not a case where "the deletion of Section 92 was a 'mistake,' " whose remedy lies with Congress. Br. in Opp. 22. To the contrary, the D.C. Circuit has erroneously construed a federal statute out of existence—a substantial legal issue that plainly calls for this Court's review.[11]

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[11] Respondents take issue (Br. in Opp. 16 n.17) with our statement that the Federal Reserve Board, in its compilation of pertinent banking statutes submitted to Congress in 1917, set forth Section 92 as part of the Federal Reserve Act. *See Third Annual Report of the Federal Reserve Board* 135-36 (1917); Pet. 16 & n.22. Respondents ignore the fact that, in that compilation, the statute appears with quotation marks only introducing each paragraph, thus showing that Section 92 is part of the Federal Reserve Act. Contrary to respondents' submission, the *Annual Report* did not show the 1916 Act with "quotation marks . . . as it appears in the Statutes at Large," Br. in Opp. 16 n.17, *i.e.*, with quotation marks closing the paragraph before the Section 5202 reference and quotation marks introducing the first paragraph of the Section 5202 reference.

4. Respondents contend (Br. in Opp. 22-24) that the D.C. Circuit's determination whether Section 92 remained in force, where the parties neither presented nor took adverse positions on that issue, is unexceptionable. Respondents neglect to mention a critical point—until ordered to respond to petitions for rehearing filed by the Comptroller and petitioner, respondents expressly adhered to the position that Section 92 remained good law. *See* Pet. 6 n.7, 7 n.9. In other words, as this Court has admonished, federal courts "do not sit . . . to give advisory opinions about issues as to which there are not adverse parties before [the courts]." *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982) (*per curiam*). Respondents' effort to distinguish *Williams v. Zbaraz*, 448 U.S. 358 (1980), is unavailing, because there, as here, the statute at issue was not "in controversy." Br. in Opp. 23 n.31.

For those reasons as well, respondents err (Br. in Opp. 23 n.30) in asserting that the court of appeals' decision may be excused under the principle that courts need not accept "stipulations as to questions of law." *Estate of Sanford v. Commissioner*, 308 U.S. 39, 51 (1939). The parties here did not reach any stipulation, and the fact that the parties each took the position that Section 92 remained good law is not tantamount to putting that "question of law" in controversy.

Finally, respondents argue that this Court should not use its "scare resources" to review this "predicate issue." Br. in Opp. 24. The issue regarding the propriety of addressing matters *sua sponte* on appeal, although often case-specific, has confused the lower courts. *Compare Warren v. City of Lincoln*, 864 F.2d 1436, 1439 (8th Cir.) (issues generally subject to review), *cert. denied*, 490 U.S. 1091 (1989); *Kirby v. Allegheny Beverage*

Corp., 811 F.2d 253, 256 n.2 (4th Cir. 1987) (same) *with Mitchell v. Keith*, 752 F.2d 385, 391 n.3 (9th Cir.) (issues not subject to review absent plain error), *cert. denied*, 472 U.S. 1028 (1985); *Cohen v. Franchard Corp.*, 478 F.2d 115, 124 (2d Cir.) (same), *cert. denied*, 414 U.S. 857 (1973). This case therefore presents an opportunity for the Court to address this "predicate," yet substantial, issue confronting federal courts.

* * * * *

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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DECEMBER 1992

No. 92-484

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES NATIONAL BANK
OF OREGON, - - - - - - - Petitioner,

v.

INDEPENDENT INSURANCE AGENTS
OF AMERICA, INC., et al., - - Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF KENTUCKY BANKERS ASSOCIATION, THE OWENSBORO NATIONAL BANK, THE FIRST NATIONAL BANK OF LOUISA, AND CITIZENS NATIONAL BANK OF PAINTSVILLE AS AMICI CURIAE IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

Whether the court below in 1992 correctly determined that Congress inadvertently repealed in 1918 a statute, enacted only two years earlier in 1916, which granted national banks in small towns the authority to act as insurance agents and under which national banks have been continuously operating ever since?

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IN THE

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BRIEF OF KENTUCKY BANKERS ASSOCIATION, THE OWENSBORO NATIONAL BANK, THE FIRST NATIONAL BANK OF LOUISA, AND CITIZENS NATIONAL BANK OF PAINTSVILLE AS AMICI CURIAE IN SUPPORT OF THE PETITION

Kentucky Bankers Association, The Owensboro National Bank, The First National Bank of Louisa, and Citizens National Bank of Paintsville submit, with the consent of Petitioner and Respondents, this brief as *amici curiae* in support of the petition for a writ of certiorari filed by petitioner, United States National Bank of Oregon.

INTEREST OF THE AMICI CURIAE

The Owensboro National Bank, The First National Bank of Louisa and Citizens National Bank of Paintsville are national banking associations (*i.e.*, national banks) organized under the laws of the United States (12 U.S.C. §§21 *et seq.*). Each is located and doing business in a town in Kentucky with a population which does not exceed 5,000 inhabitants as shown by the 1990 Census.

Kentucky Bankers Association (the "KBA") is a trade association of banks in Kentucky. Each of the three national banks is a member of the KBA. In addition, 81 of the 82 other national banks located in Kentucky are members of the KBA.

All four of the *amici curiae* (collectively referred to herein as the "National Banks") are parties to litigation initially filed in the United States District Court for the Eastern District of Kentucky and currently pending before the United States Court of Appeals for the Sixth Circuit concerning the right of national banks located and doing business in towns with a population which does not exceed 5,000 inhabitants as shown by the last preceding decennial census (hereinafter "qualified national banks") to act as the agent for any fire, life or other insurance company. *Owensboro National Bank* v. *Moore*, No. 91-3 (E.D. Ky.), *appeal docketed*, No. 92-6330/31 (6th Cir.) (hereafter the "Kentucky Litigation").

In the Kentucky Litigation, the National Banks seek to (a) compel the Kentucky Department of Insurance to issue them applications to become insurance agents for non-credit related insurance and (b) prohibit the department from denying their applications for insurance agent licenses on the ground that they are submitted by banks.

The Kentucky Department of Insurance and three intervening insurance trade associations (collectively referred

to as the "Insurance Industry") have opposed the National Banks on the ground that Kentucky law prohibits banks from acting as insurance agents for non-credit related insurance.

In response, the National Banks argue, among other things, that federal law preempts the Kentucky law on which the Insurance Industry relies. The United States of America has intervened in the case and the American Bankers Association has appeared as *amicus curiae*, both supporting the National Banks.

The federal law on which the National Banks rely was enacted in 1916 and has historically been referred to as 12 U.S.C. §92. *See Act of September 7, 1916*, Pub. L. No. 64-270, 39 Stat. 752, 753-754 (the "1916 Act"). That law expressly provides that a national bank:

> ". . . located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of Currency, act as the agent for any fire, life or other insurance company . . . ."

The National Banks use the word "historically" when referring to 12 U.S.C. §92 since the language added by the 1916 Act was codified during the years 1926 through 1952 as Section 92 of Title 12 of the United States Code. However, in 1952, the legislation was "omitted" from the United States Code by the unilateral action of the compiler of the United States Code.[1] The compiler believed, based upon

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[1]The statement that §92 was "omitted" is particularly unusual if the compiler was correct that §92 was repealed in 1918. That is because the 1952 Code uses the term "repealed" with respect to other statutes which Congress "repealed". *Compare* 12 U.S.C. §2 (1952) and 12 U.S.C. §51d (1952) *with* 12 U.S.C. §92 (1952).

the placement of some quotation marks in the 1916 Act as printed, that §20 of War Finance Corporation Act of 1918 had the effect of repealing §92.[2]

Obviously, the "omission" of §92 was the cause of some concern at the time. However, upon careful examination during Congressional hearings in 1958, Congress and the federal banking regulators rejected the conclusion that §92 had been repealed. *See Financial Institutions Act of 1957: Hearings Before the House Banking and Currency Committee on S. 1451 and H.R. 7026*, 85th Cong., 2d Sess. (1958) (hereinafter "1958 Hearings"). Indeed, Congress has on two occasions since 1916 enacted legislation affecting §92.[3]

Nevertheless, the United States Code has continued to "omit" §92. *See* 12 U.S.C. §92 (1988).[4] On the other hand, §92 appears in the United States Code Service published

[2]*See* War Finance Corporation Act, Pub. L. No. 65-121, §20, 40 Stat. 506, 512 (1918).

[3]*See Garn-St. Germain Depository Institutions Act*, Pub. L. No. 97-320, §403(b), 96 Stat. 1469, 1511 (1982) (deleting language from §92 relating to geographic limits on §92 real estate loan brokerage activity); *See also Competitive Equality Banking Act of 1987*, Pub. L. No. 100-86, §201(b)(5), 101 Stat. 552, 581-583 (1987) (imposing a one-year moratorium on national banks expanding §92 insurance agency activities to geographic regions not then served).

[4]Currently, 1 U.S.C. §208 (1988) provides that publication of the United States Code is the responsibility of the Committee on the Judiciary of the House of Representatives or such other agency as the Congress may by concurrent resolution provide. Section 205(c) of House Resolution No. 988, 93rd Cong. (Oct. 8, 1974), assigned responsibility to the Office of the Law Revision Counsel. Effective January 2, 1975, House Resolution No. 988 was enacted into permanent law codified at 2 U.S.C. §285 through §285g (1988). *See Supplemental Appropriations Act of 1975*, Pub. L. No. 93-554, Title I, Ch. III, §101, 88 Stat. 1771, 1777 (1975).

by The Lawyers Co-operative Publishing Co. with the explanation that the position of the compilers of the United States Code "is not consistent with the case law." *See* 12 U.S.C.S §92 (Law. Co-op. 1978 & Supp. 1992).[5]

The editors of the United States Code Service are correct. Until this year, every court since 1916 had treated §92 as being in existence.[6] However, that unanimity ended on February 7, 1992, when the United States Court of Appeals for the District of Columbia Circuit issued its opinion in this case "find[ing] *sua sponte* that that section [§92] has been repealed". *Independent Ins. Agents of America, Inc.* v. *Clarke*, 955 F.2d 731, 732 (D.C. Cir. 1992). This decision was highly unusual since even the plaintiffs in that case (the Respondents here) stated during oral argument that "we have concluded that we cannot advance a substantial argument that section 92 no longer exists." 955 F.2d at 741 (Silberman, J., dissenting).

The D.C. Circuit's decision was rendered only five days before oral argument in the Kentucky Litigation on the

[5]Because Title 12 of the United States Code has not been enacted into positive law, the compilation is treated as "prima facie the laws of the United States." 1 U.S.C. §204(a) (1988). However, that presumption can be overcome by recourse to the original statutes themselves. *United States* v. *Welden*, 377 U.S. 95, 98 n.4 (1963).

[6]*E.g., Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972); *First National Bank of Lamarque* v. *Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir. 1980); *Independent Bankers Ass'n of America* v. *Heimann*, 613 F.2d 1164, 1170 & nn.18-20 (D.C. Cir. 1979); *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968); *Commissioner of Internal Revenue* v. *Mary Archer W. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1965); *Genessee Trustee Corp.* v. *Smith*, 102 F.2d 125 (6th Cir. 1939); *Thompson* v. *Kerr*, 555 F. Supp. 1090, 1906 & n.6 (S.D. Ohio 1982); *Guaranty Mortgage Co.* v. *Z.I.D. Associates, Inc.*, 506 F. Supp. 101, 104 (S.D.N.Y. 1980).

merits of the National Banks' preemption claim. After being advised at the oral argument of the D.C. Circuit's decision, the Kentucky District Court entered an order directing that the parties file memoranda addressing whether §92 had been repealed.

While the District Court in the Kentucky Litigation was considering the memoranda submitted by the National Banks and the other parties, the United States Court of Appeals for the Second Circuit also felt "compelled to address this issue [of §92's existence]" in light of the D.C. Circuit's decision "even though the parties neither briefed nor argued it." *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150, 151 (2d Cir. 1992) ("*ALTA*").

At issue in *ALTA* was whether the Comptroller of the Currency (the "Comptroller") properly decided that a national bank, not located and doing business in a small town, may engage in the title insurance agency business. The existence of §92 was considered relevant in addressing the legality of the Comptroller's decision since competing insurance trade associations argued that §92 impliedly prohibits national banks from selling title insurance in towns with more than 5,000 inhabitants.

On June 15, 1992, the Second Circuit flatly rejected the D.C. Circuit's analysis and expressly held that "the only rational interpretation" was that Congress did not repeal §92 in 1918. *ALTA*, 968 F.2d at 154.[7]

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[7]Chase Manhattan Bank, N.A. and the United States of America have filed petitions for a writ of certiorari to review the judgment in *ALTA*. *Chase Manhattan Bank, N.A.* v. *American Land Title Ass'n*, No. 92-482 (U.S. Sept. 17, 1992); *Steinbrink* v. *American Land Title Ass'n*, No. 92-645 (U.S. Oct. 13, 1992). Those

(Footnote continued on following page)

On August 5, 1992, the District Court in the Kentucky Litigation entered its Memorandum Opinion and Order considering §92's existence in light of the split in authority created by the D.C. and Second Circuit decisions.

Like the Second Circuit, the District Court in the Kentucky Litigation concluded that a decision that §92 had been repealed "would be to circumvent logical statutory construction." Indeed, the District Court expressly adopted the reasoning of the Second Circuit and further stated that its own "examination of the legislative history of §92 would have led it to the same conclusion quite apart from the Second Circuit's decision." *See* App., *infra*, 15a-16a.

Having concluded that §92 exists, the District Court further held that §92 preempted the Kentucky statute relied upon by the Insurance Industry and enjoined the Kentucky Department of Insurance from refusing to issue insurance agent applications to qualified national banks.

On October 5, 1992, the Insurance Industry defendants in the Kentucky Litigation filed notices of appeal. In their Pre-Argument Statements filed with Sixth Circuit, the In-

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(Footnote continued from preceding page)

petitions seek review of the Second Circuit's decision that §92 impliedly bars national banks not located in small towns from acting as title insurance agents. Chase Manhattan Bank's petition also asks the Court to resolve the issue of §92's existence.

Because all parties in the *ALTA* case agreed that §92 exists, the National Banks respectfully submit that review of the D.C. Circuit's decision (where the insurance industry respondents ultimately argued that §92 has been repealed) is the superior vehicle for presenting the dispute as the §92's existence. However, the National Banks fully support the petitions seeking review of the Second Circuit's decision (which the National Banks believe is incorrect) on the title insurance power issue.

surance Industry states that it intends to raise the issue of §92's existence.

As parties to the Kentucky Litigation — a case that concerns the preemptive effect of §92 — the National Banks plainly have a direct and substantial interest in whether or not §92 was repealed in 1918. That issue has festered for almost seventy-five years and will continue to distract affected parties and the lower federal courts until it is definitely resolved by this Court.

Accordingly, the National Banks appear in this case to urge this Court to issue a writ of certiorari and authoritatively state that §92 remains the law of these United States.

REASONS FOR GRANTING THE WRIT

I. A Decision On The Continued Existence Of 12 U.S.C. §92 Is Necessary To Resolve A Conflict In The Courts Of Appeals On A Substantial Question Of Federal Law.

A "principal purpose" for granting a writ of certiorari is to "resolve conflicts among the Circuit Court of Appeals and state courts concerning the meaning of provisions of federal law." *Braxton* v. *United States*, ___ U.S. ___, 111 S.Ct. 1854, 1856 (1991). *See also* Supreme Court Rule 10.1(a). In this case, the D.C. Circuit's decision is in direct conflict with the decision of the Second Circuit in *ALTA*.

Review is particularly appropriate because the conflict has called into question the existence of a federal statute as well as the legality of widespread and substantial insurance activities of national and state banks across the country. *Cf., Federal Savings and Loan Insurance Corp.* v. *Ticktin*, 490 U.S. 82, 83 (1989) (granting certiorari where Court of Appeals' decision "would require dismissal of large number of cases concerning the integrity of our financial institutions").

The evidence presented by the Comptroller in the Kentucky Litigation was that as many as 179 national banks in fifteen states conduct insurance agency activities pursuant to 12 U.S.C. §92. In addition, the Comptroller estimated that at least 115 state chartered banks sell insurance under state parity statutes that permit them to engage in the same activities as national banks. *See* Declaration of Rosa M. Koppel, Esq. ¶¶6, 7 (Apr. 14, 1992) (App., *infra*, 25a). *See also* Ariz. Rev. Stat. Ann. §6-184.2; Ill. Rev. Stat. ch. 17, para. 311(11); Md. Fin. Inst. Code Ann. §5-504; N.D. Cent. Code Ann. §6-03-38; Utah Code Ann. §7-3-10(1).

That those insurance activities have been undertaken in reliance upon a statute that has been treated by the Comptroller, the courts, and Congress as being in existence since 1916 makes it particularly appropriate to review a decision by the D.C. Circuit suddenly invalidating that statute. *Cf. Bankamerica Corp.* v. *United States*, 462 U.S. 122, 132 (1983) (refusing to permit the Department of Justice to change its interpretation of the Clayton Act to prohibit interlocking directorates between a bank and an insurance company where the affected industry and Congress had relied on the Department's interpretation for over 60 years); *Wisconsin* v. *Illinois*, 278 U.S. 367, 413 (1928).

Furthermore, the implications of this case extend beyond whether national banks in small towns may act as insurance agents.

First, the analysis used by the D.C. Circuit to "repeal" §92 is equally applicable to two other statutes which the United States Code also "omits":

> (a) 12 U.S.C. §361, a paragraph contained in Section 13 of the Federal Reserve Act of 1913 relating to the rediscount by Federal Reserve Banks of bills of exchange which immediately precedes the language of

§92 and which was slightly amended by the 1916 Act; and

(b) 12 U.S.C. §373, a paragraph added by the 1916 Act immediately following the language of §92 and which relates to the acceptance by member banks of the Federal Reserve System of drafts for foreign exchange purposes.[8]

See Opinion of Robert Neill, Counsel for the Advisory Committee for the Study of Federal Statutes Governing Financial Institutions and Credits (Feb. 1, 1958), *reprinted in* 1958 Hearings 1010, 1022-1023.

Second, because courts have regularly resolved other banking issues by drawing inferences from §92, a decision that §92 does not exist inevitably calls those decisions into question. *See Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972) (relying on §92 to overturn a determination by the Commissioner of Internal Revenue attributing to certain banks in large cities income derived from the sale of insurance policies by affiliated companies); *Alabama Ass'n of Ins. Agents* v. *Board of Governors of the Federal Reserve System*, 533 F.2d 224 (5th Cir. 1976), *modified*, 558 F.2d 729 (1977), *cert. denied*, 435 U.S. 904 (1978) (initially relying on §92 to invalidate Federal Reserve Board regulations which would have permitted non-bank subsidiaries of bank holding companies to sell insurance in small towns or towns with inadequate insurance agency facilities); *Genessee Trustee Corp.* v. *Smith*, 102 F.2d 125, 127 (6th Cir. 1939) (language of §92

[8]Interestingly, while the 1952 Code did "omit" 12 U.S.C. §373 (1952), it did *not* "omit" 12 U.S.C. §361 (1952) even though this paragraph should be treated as repealed under the analysis which supposedly justified omitting §92. The 1958 Code eliminated this inconsistency and "omitted" 12 U.S.C. §361 (1958). *Compare* 12 U.S.C.S. §361 (Law. Co-op. 1992) (omitting section) *with* 12 U.S.C.S. §373 (Law. Co-op. 1992) (not omitting section).

supported a determination that national banks may only sell and indorse promissory notes on a non-recourse basis).

In addition to those final decisions, there are two other important cases currently pending in which §92 has played a key role. In addition to the Second Circuit's decision in *ALTA*, the Fifth Circuit is considering the validity of the Comptroller's determination that a national bank may sell fixed rate and variable rate annuities through a securities subsidiary. *Variable Annuity Life Ins. Co.* v. *Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal docketed*, No. 92-2010 (5th Cir. Dec. 23, 1991). The competing annuity underwriter which brought the action is arguing that annuities are insurance products and §92 bars the Comptroller from permitting a national bank not located in a small town from selling insurance products.

In light of the importance of §92 to the national banking system, plenary review by this Court is plainly warranted.

II. Immediate Review Is Appropriate Since The D.C. Circuit's Decision Was Seriously Flawed And Arguments Are Being Advanced That The Decision Will Be Effectively Binding In Other Circuits.

This is not a case where the Court should wait for additional decisions from other Courts of Appeals. Quite simply, and as the petitions for writ of certiorari plainly demonstrate, the analysis of the D.C. Circuit was so seriously flawed that it should not be permitted to remain as precedent.

There is already ample authority indicating that the decision of D.C. Circuit was incorrect. In addition to the recent decisions by the Second Circuit and in the Kentucky Litigation, the issue of whether §92 was repealed in 1918 was found to be "moot" by the Fifth Circuit over a decade ago. *First National Bank of Lamarque* v. *Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir. 1980).

Failure to review the D.C. Circuit's erroneous decision would be particularly perilous since the Insurance Industry in the Kentucky Litigation argued (albeit incorrectly) that the D.C. Circuit's decision will govern the conduct of national banks located in other circuits. Specifically, in their memorandum filed with the District Court addressing the effect of the D.C. Circuit's decision, the Insurance Industry argued:

> The D.C. Circuit held that the Comptroller, the defendant in *IIAA* v. *Clarke*, unlawfully authorized a national bank to sell insurance pursuant to Section 92 . . . . As a result of *IIAA* v. *Clark*, the plaintiff banks in this case [the *amici curiae* National Banks] cannot obtain valid authorization from the Comptroller to sell non-credit insurance from the small towns in which they have offices. Should the Comptroller grant plaintiffs approval despite the D.C. Circuit's decision in *IIAA* v. *Clark*, these defendants [the Insurance Industry] would challenge the Comptroller's actions in federal court in the District of Columbia. Were the banks to attempt to sell non-credit insurance without Comptroller authorization, these defendants would bring a mandamus action against the Comptroller in federal court in the District of Columbia, seeking the agency's enforcement of the National Bank Act. In either case, the court would be bound by the D.C. Circuit's decision in *IIAA* v. *Clark*: The court would necessarily hold that Section 92 does not exist and therefore does not authorize the plaintiff banks to sell non-credit insurance.

Defendant's and Intervenors' Joint Post-Argument Brief, *Owensboro National Bank.* v. *Moore*, No. 91-3 (E.D. Ky.) at 5-6 (served Mar. 24, 1992) (footnotes omitted).[9]

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[9]The Insurance Industry's argument as to the binding effect on the National Banks of the D.C. Circuit's decision is incorrect. First, the D.C. Circuit's decision is not binding with respect to

(Footnote continued on next page)

This Court should review the D.C. Circuit's decision to avoid enmeshing other national banks in the kind of enforcement quagmire with which the Insurance Industry has threatened the National Banks in the Kentucky Litigation.

III. The D.C. Circuit's Decision Is In Conflict With This Court's Decision In *Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*

This Court's Rule 10.1(c) provides that a reason justifying review is that the lower court's decision "decided a federal question in a way that conflicts with applicable decisions of this Court." In this case, the D.C. Circuit's decision is in conflict with the decision in *Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972).

In that case, this Court refused to permit the Commissioner of Internal Revenue to reallocate to certain national banks, for tax purposes, a portion of credit life insurance premiums earned by affiliates of the banks. One basis for the decision that reallocation was improper was that §92 prohibited the national banks from receiving the premiums.

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any obligations that the United States may have toward the National Banks who were not parties to that litigation. *See United States* v. *Mendoza*, 464 U.S. 154 (1984) (United States not subject to non-mutual collateral estoppel). Second, even if the Insurance Industry could compel the Comptroller to bring an enforcement action against the National Banks, under 12 U.S.C.A. §1818(b)(1), §1818(h), and §1818(i) (West 1989 and Supp. 1992), any enforcement action would have to be brought in the Sixth Circuit, and the D.C. Circuit's decision is plainly not binding there. *United States* v. *Dawson*, 576 F.2d 656, 659 (5th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979); *Kirsch Co.* v. *Bliss and Laughlin Industries, Inc.*, 495 F.Supp. 488, 492 (W.D. Mich. 1980).

The Supreme Court so relied on §92 even though both the majority opinion and Justice Blackmun's dissent called attention to §92's omission from the U.S. Code. *See* 405 U.S. at 401 n.12, 418 n.2, 419. Indeed, Justice Blackmun noted the majority's "repetitive emphasis on the missing §92." *See* 405 U.S. at 419. Justice Marshall dissented on the ground that the national banks were violating §92, and he made no mention of the repeal issue. *See* 405 U.S. at 411-414.

The D.C. Circuit attempted to distinguish the Supreme Court's analysis by stating that the Supreme Court only assumed §92's validity and "never directly addressed" the issue of its alleged repeal. *Independent Insurance Agents*, 955 F.2d at 737-739.

While this Court never explicitly held that §92 had not been repealed, it is difficult to square the Court's repeated discussion of §92 with the conclusion that §92 no longer existed (particularly when the Court was plainly aware of the issue). This difficulty is particularly true when Justice Blackmun cited pages 777 through 779 of Howard Hackley's article *Our Baffling Banking System — Part II*, 52 Va. L. Rev. 771 (1966). *See First Security Bank*, 405 U.S. at 418 n.2. In his article, Hackley, who was then General Counsel to the Board of Governors of the Federal Reserve System, wrote:

> [T]he Comptroller was clearly correct [that §92 was not repealed in 1918]. The provisions in question were omitted from the United States Code in 1952 (*not* in 1918) by a careless codifier simply because an inadvertently misplaced quotation mark in a 1918 amendment to Section 5202 of the Revised Statutes relating to an entirely different subject. Unquestionably the codifier was wrong and the provision authorizing national banks to act as insurance agents is still in force.

52 Va. L. Rev. at 778.

Even assuming the D.C. Circuit's reading is correct, this Court's discussion of §92 in *First Security Bank* is informative for what was not said. This Court did not say that the issue of §92 repeal was so clear that it could not rely on §92. On the other hand, the Court did say that the Comptroller's "administrative interpretation [of the meaning of §92] over many years is entitled to great weight." *Id.* at 403 n.16.

At the very least, the D.C. Circuit's opinion is very questionable in light of the *First Security Bank* decision and review is appropriate to resolve the confusion.

IV. That Portion Of The D.C. Circuit's Decision As To The Existence Of §92 Should Be Addressed Even If The Court Determines That The D.C. Circuit Acted Inappropriately In Raising The Issue *Sua Sponte*.

Petitioner, United States National Bank of Oregon, also seeks review on whether or not the D.C. Circuit acted erroneously by *sua sponte* raising the issue of §92's existence when the litigants did not address the question before the District Court or initially in the D.C. Circuit. *See* Petition of the United States National Bank of Oregon, Question Presented #2.

Conceivably this Court could reverse on the ground that it was inappropriate for the D.C. Circuit to consider the issue of §92's repeal. *Cf. Board of Governors of the Federal Reserve System* v. *MCorp. Financial, Inc.*, ___ U.S. ___, 112 S.Ct. 459 (1991) (reversing Court of Appeal's decision which invalidated the Federal Reserve Board's "source of strength" regulation on the ground that Court of Appeals did not have jurisdiction to consider the merits).

However, the National Banks strongly urge that this Court exercise its certiorari power and resolve the issue of

the existence of §92 regardless of the Court's view as to whether or not it was proper for the D.C. Circuit to address the matter.

Ever since the unilateral decision in 1952 by the codifier of the United States Code to "omit" §92, the issue of §92's repeal has been a recurring concern. A reversal of the D.C. Circuit's decision on jurisdictional grounds will only serve to further muddy the waters. Litigants will still be able to argue that the D.C. Circuit's analysis was correct.[10]

Quite simply, in 1972, this Court left unresolved the question of §92's existence when it noted the issue in *Commissioner of Internal Revenue* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394, 401 n.12 (1972), but did not render a clearly authoritative decision. The issue has again arisen and has put in disarray the authority for qualified national banks to act as insurance agents. This Court should not permit the issue to fester further. It should resolve the matter once and for all.

CONCLUSION

In light of the conflict in the circuits, the importance of the issue, and the reoccurring nature of the dispute, this Court should grant the petition for a writ of certiorari and should decide whether Congress repealed 12 U.S.C. §92 in 1918.

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[10]That Congress could enact legislation plainly reenacting §92 also is not a sufficient reason for delaying review. *See Braxton* v. *United States*, ___ U.S. ___, 111 S.Ct. 1854, 1857 (1991) (the task of clarifying federal statutes is "initially and primarily" that of the Supreme Court).

Respectfully submitted,

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November 21, 1992

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

Civil Action No. 91-3

THE OWENSBORO NATIONAL BANK, *et al.*, - - *Plaintiffs,*

and

UNITED STATES OF AMERICA, - - *Intervening Plaintiff,*

v. **MEMORANDUM OPINION AND ORDER**

RONNIE C. MOORE, Commissioner, - - - *Defendant,*

and

KENTUCKY STATE ASSOCIATION OF LIFE UNDERWRITERS, *et al.*, - - *Intervening Defendants.*

This matter is before the court upon several pending motions. The defendant, Ronnie C. Moore, the Commissioner of the Kentucky Department of Insurance (the Commissioner), has moved to dismiss the complaint. [Record #4]. The intervening defendants (collectively referred to as "the associations") have also filed a motion to dismiss. [Record #7]. The plaintiffs have moved for summary judgment, [Record #14], as have the Commissioner and the associations. [Record #28]. Finally, the United States has moved for summary judgment on its intervening complaint. [Record #60]. These motions have been fully briefed and argued to the court, and this matter is ready for consideration.

I. Factual Background

The underlying facts of this case are undisputed. The plaintiff banks are national banking associations organized under the laws of the United States. Two of the plaintiffs, The First National Bank of Louisa, and Citizens National Bank of Paintsville are located in Kentucky towns with less than 5,000 inhabitants, as shown by the 1990 Decennial Census. The other banking plaintiff, The Owensboro National Bank, maintains a branch in Whitesville, Kentucky, which also has a 1990 population of less than 5,000 persons. Each plaintiff bank is owned by a bank holding company.

In the fall of 1990, the plaintiff banks communicated to the Commissioner their wish to apply for licenses to act as general lines and life insurance agents. Responding by letter dated January 10, 1991, the Commissioner declined to immediately provide the requested applications, stating that "such a dramatic change in our long-standing interpretation of both statutory and case law should not be lightly granted." Letter from Commissioner Elizabeth Wright to M. Brooks Senn (January 10, 1991) [Record #16, Tab 6]. Rather, the Commissioner scheduled a public hearing for February 13, 1991, to determine "whether or not the Kentucky Department of Insurance shall issue the insurance agents licenses requested . . . upon completion of the applicable licensing procedures as set forth in KRS 304, Subtitle 9 . . . ." [Record #30, Tab 2].

On January 24, 1991, the plaintiffs filed the present action in this court seeking a declaration of rights and injunctive relief. [Record #1]. Specifically, the plaintiffs asked this court to require the Commissioner's compliance with 12 U.S.C. § 92, which purportedly permits national banks having an office in towns with less than 5,000 inhabitants to act as insurance agents.

The day prior to filing suit, one of the plaintiffs, the Kentucky Bankers Association (the KBA), apparently distributed a memorandum to its members stating that the Commissioner's hearing "could prove to be a circus", and may be "nothing more than a 'name-calling' session." Memorandum from Ballard W. Cassady, Jr. to KBA Members (January 23, 1991) [Record #5, Exhibit C]. The KBA urged its members not to attend the hearing. Nevertheless, the plaintiffs did attend, but called no witnesses. Rather, they submitted written objections to the hearing itself, and restated their legal arguments.

No resolution was attained at the hearing, and the hearing officer permitted the Commissioner to engage in limited discovery, over plaintiffs' objection. [Record #11, Tabs 5 & 6]. The hearing was recessed until April 8, 1991, and at that time additional evidence was presented by the Commissioner. No final action ever resulted from the hearing, and further proceedings in the Department of Insurance were eventually stayed, pending the outcome of this litigation, by order of the Franklin Circuit Court. [Record #24, Exhibit 1].

This matter has been submitted to this court on cross-motions for summary judgment, and the parties have presented arguments on those motions. However, the Commissioner and the associations have asserted that this court does not have subject matter jurisdiction over this action. That assertion must be addressed prior to any consideration of the motions for summary judgment.

II. Justiciability

The Commissioner and the associations raise several arguments in support of their contention that this court lacks subject matter jurisdiction. They contend that this matter is not ripe for decision as no final action has been taken by the Commissioner. They further assert that the plaintiffs have not exhausted their state remedies. Finally, they argue that this court should abstain from adju-

dicating this action because to do so would interfere with ongoing state proceedings, and because the plaintiffs' claims raise unsettled questions of state law.

A. Ripeness

This court is limited to the adjudication of actual cases or controversies. U. S. Const. art. III, §2. For this court to exercise jurisdiction over this case, it must be ripe for decision. The doctrine of ripeness "dictates that the courts should decide only existing, substantial controversies, not hypothetical questions or possibilities." *City Communications, Inc.* v. *City of Detroit,* 888 F.2d 1081, 1089 (6th Cir. 1989). In the context of administrative action, this doctrine prevents courts from becoming involved in disagreements over administrative policies and protects agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 148 (1967).

Here, the Commissioner and the associations argue that because the Department of Insurance was not permitted to complete its administrative process before this suit was filed, the dispute is not ripe for decision. It is true that this action was filed on January 24, 1991, after the plaintiffs received notice of the public hearing on their request for applications, but before the hearing was held. However, as will be seen in detail later, the Commonwealth of Kentucky, acting through its Attorney General and/or the Commissioner, has long taken the position that the plaintiff banks are not authorized to act as insurance agents in Kentucky.

In addressing the issue of ripeness, the court is persuaded by the reasoning of the Supreme Court in *Columbia Broadcasting System* v. *United States,* 316 U.S. 407 (1942). In *CBS,* the Federal Communications Commission had issued a regulation which would have prevented the issu-

ance of radio licenses to stations which signed network affiliation contracts with certain provisions. Although no license had been revoked and the FCC had not refused to grant any license based upon the regulation, the Court held that a challenge to the regulation was ripe. The court specifically noted that the FCC action was no less reviewable because promulgation of the regulation itself did not deny or cancel a license. It was enough that failure to comply with the regulation would penalize the licensees, and ultimately CBS, the contracting network. *Id,* at 417; *see also United States* v. *Storer Broadcasting Co.,* 351 U.S. 192 (1956).

The present situation is similar. Although the Commissioner has not taken final action with respect to the plaintiff banks' requests for applications, his longstanding view of the questions involved constitute action which is sufficiently final to concretely affect the plaintiffs [sic] interests. This view is amply supported by the aggressive stance the Commissioner has taken in this litigation in setting forth his view of both federal and state law in this area and the interaction between both spheres. Ripeness is now viewed as a matter of common sense, and the court is convinced that absolutely no purpose would be served by permitting the Commissioner to continue with his charade of evaluation before this court addresses the merits of this litigation. *See McCoy-Elkhorn Coal Corp.* v. *United States Environmental Protection Agency,* 622 F.2d 260, 264 (6th Cir. 1980).

This decision comports with the Supreme Court's two part ripeness test articulated in *Abbott Laboratories.* There the Court determined that ripeness depends upon both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Abbott Laboratories,* 387 U.S., at 149. This action presents purely legal questions which are fit for judicial decision at this

time. In addition, this court has no difficulty concluding that hardship to the plaintiffs would result if judicial consideration were withheld. This matter is ripe for decision by this court.

B. Exhaustion

When the actions of an administrative agency are involved, exhaustion of remedies is generally required to prevent premature interference with agency processes, so that the agency may function efficiently and correct its own mistakes, to afford the parties and the court the benefit of the agency's expertise, and to compile an adequate record for judicial review. *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975). However, when the issue is solely one of statutory interpretation, judicial review is permitted since resolution of the issue requires no special expertise on the part of the involved agency. *McKart* v. *United States*, 395 U.S. 185, 198-99 (1969).

Here, the issues before the court involve questions of law and statutory interpretation. There is no requirement that the plaintiffs exhaust their administrative remedies under these circumstances. Since the Commissioner has admitted that the plaintiffs meet the location requirements of 12 U.S.C. § 92, [Record #11, Tab 4], any further consideration by the Commissioner would involve the same evaluation of legal issues performed by this court. The plaintiffs' failure to exhaust their state administrative remedies does not prevent this court from exercising jurisdiction over this matter. *Shawnee Coal Co.* v. *Andrus*, 661 F.2d 1083, 1093 (6th Cir. 1981).

C. Abstention

The Commissioner and the associations point to two lines of abstention cases in support of their argument that this court should decline to exercise its jurisdiction in this matter. The court will address each line of cases separately.

1. *Younger* Abstention

Ordinarily, federal courts should not issue declarative or injunctive relief which would interfere with ongoing state proceedings. *Younger* v. *Harris*, 401 U.S. 37 (1971). However, the Commissioner and the associations are incorrect in arguing that *Younger* applies in the present case.

The ultimate question in this litigation is whether state law is preempted by federal law. In that circumstance, abstention is not required. *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 237 (1984). This case neither requires the interpretation of state law nor the making of findings on disputed facts. The considerations which would require *Younger* abstention are not present. *Norfolk & Western Railway Co.* v. *Public Utilities Comm. of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991).

2. *Burford* Abstention

This court should also abstain from granting equitable relief that interferes with proceedings in state administrative agencies which involve complex state regulatory policies, such as ratemaking. *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943). However, like the *Younger* doctrine, *Burford* does not prevent this court from addressing issues of federal preemption of state law. *New Orleans Public Service, Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350 (1989). This case does not implicate *Burford* abstention.

D. The Motions to Dismiss

The motions to dismiss of the Commissioner and the associations are without merit for the reasons stated above. Both motions will be denied.

III. Legal Framework

Prior to evaluating the merits of the cross-motions for summary judgment, it is essential to set forth the legal

framework for the discussion. Both federal and state law are involved, and the court will briefly discuss each.

A. Federal Law

The plaintiff banks are national banking associations organized under the laws of the United States. *See* 12 U.S.C. § 1 *et seq.* The National Banking Act constitutes the paramount authority for the operation of national banking associations, and, by itself, constitutes a complete system for the establishment and government of national banks. *First National Bank in Plant City, Fla.* v. *Dickinson,* 396 U.S. 122 (1969); *Deitrick* v. *Greaney,* 309 U.S. 190 (1940). However, national banks are also subject to state laws, so long as those state laws do not conflict with or frustrate the purpose of laws of the United States. *Starr* v. *O'Connor,* 118 F.2d 548 (6th Cir. 1941).

The National Banking Act was enacted in 1864. Act of June 3, 1864, c. 106, 13 Stat. 99. In 1913, Congress enacted the Federal Reserve Act, Act of December 23, 1913, c. 6, 38 Stat. 251, to foster a flow of credit and money, through both federal and state chartered institutions, which would facilitate orderly economic growth. *Collateral Lenders Committee* v. *Board of Governors of the Federal Reserve System,* 281 F.Supp. 899, 904 (S.D.N.Y. 1968).

In 1916, Congress amended the Federal Reserve Act, adding, among other sections, 12 U.S.C. § 92.[1] This section was added at the request of the Comptroller of the Currency, and allowed national banks located in towns with less than 5,000 inhabitants to sell insurance under certain

[1]The question of whether this section continues to exist will be addressed later in this memorandum opinion and order.

circumstances.[2] The Comptroller has issued a regulation which provides that this section is applicable to any branch of a national bank which is located in a town with less than 5,000 inhabitants, even though the principal office of the national bank may be in a town with a population greater than 5,000 persons. 12 C.F.R. § 7.7100 (1971). Although there is a question as to whether 12 U.S.C. § 92 was repealed in 1918, the Comptroller has continued to assume that the section remains in force. *See e.g.,* Letter from First Deputy Comptroller for Policy Robert Bloom to Oklahoma Insurance Commissioner Gerald Grimes (November 14, 1975) [Record #11, Tab 8]; and Letter from Chief Counsel Paul Allen Schott to Louisiana Insurance

[2]The full text of this section is as follows:

> In addition to the powers now [Sept. 7, 1916] vested by law in national banking associations organized under the laws of the United States any such association located in and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: Provided, however, That no such bank shall in any case guarantee either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: And provided further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.
>
> (Sept. 7, 1916, c. 461, 39 Stat. 753).

Commissioner Douglas D. Green (October 30, 1990) [Record #16, Tab 27].

Presently, approximately 179 national banks in fifteen states are conducting insurance activities pursuant to 12 U.S.C. § 92. Affidavit of Rosa M. Koppel, [Record #61, Exhibit 1]. None of these national banks are located in Kentucky. *Id.*

B. Kentucky Law

Despite the enactment of 12 U.S.C. § 92, and quite apart from any debate over its continued existence, the Commissioner contends that national banks located in Kentucky may not engage in insurance activities, except in limited circumstances. The Commissioner presently finds support for this position in Ky. Rev. Stat. 287.030(4), which provides:

> No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except credit life insurance, credit health insurance, insurance of the interest of a real property mortgagee in mortgaged property, other than title insurance.

In an opinion addressing an earlier version of this statute, the Kentucky Attorney General concluded that a provision prohibiting one person from holding controlling interest in a bank was applicable to national banks doing business in Kentucky. Ky. OAG 70-643. Statutory language similar to the present language prohibiting insurance activities by persons owning more than one-half of the stock of a bank was added in 1972. 1972 Kentucky Acts ch. 174. In 1981, the Kentucky Attorney General issued an opinion, based upon this statute, which concluded that a bank holding company could not acquire 100% of the outstanding stock of an insurance agency. Ky. OAG

81-173. In 1984, the present language was enacted as a part of the Kentucky Bank Holding Company Act. 1984 Kentucky Acts ch. 130.

Since 1984, the Commissioner has taken the position that the present version of the statute, as set forth above, is applicable to national banks, and has used the 1970 Attorney General's Opinion as support for his position. See Letter from Assistant General Counsel Stephen B. Cox to David F. Presser (February 28, 1986) [Record #16, Tab 7].[3] The Commissioner has also taken the position that 12 U.S.C. § 92 only provides that the sale of insurance by a national bank is not *ultra vires* to the bank's charter, and does not convey a unilateral right to engage in the business of insurance.

Having provided the legal framework for the discussion, the court will now turn to the substantive claims of the parties. A very narrow question is presented: May the Commissioner, consistent with federal law, refuse to permit national banks to apply for insurance licenses?

IV. The Bank Holding Company Act

The Commissioner and the associations maintain that the Bank Holding Company Act (BHCA), 12 U.S.C. § 1841 *et seq.*, allows states to regulate bank holding companies and their subsidiaries, including national banks, in the manner prescribed in Ky. Rev. St. 287.030(4). If true, this conclusion would obviate the need to address the questions presented under 12 U.S.C. § 92.[4]

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[3]The Commissioner likely took this position prior to 1984, as well, although no documents to that effect have been presented to the court.

[4]In addressing this argument, this court will assume, without deciding, the continued existence of 12 U.S.C. §92. This is consistent with the position of the Commissioner and the associations that the court may decide the BHCA issue without reaching the question of the statute's continued existence.

The BHCA was enacted in 1956, to provide federal regulation of bank holding companies and the type of assets appropriate for such companies to control. S. Rep. No. 1095, 84th Cong., 1st. Sess. 1 (1955). Unlike national banks, which are primarily regulated by the Comptroller of the Currency, primary regulatory authority for bank holding companies was placed with the Board of Governors of the Federal Reserve System (Federal Reserve Board). 12 U.S.C. § 1842. The BHCA is divided into two principal areas. Section 3, 12 U.S.C. § 1842, governs the authority of the Federal Reserve Board with respect to banking subsidiaries of bank holding companies. Section 4, 12 U.S.C. § 1843, governs the acquisition of non-banking subsidiaries.

The Commissioner and the associations argue that Section 7 of the BHCA, 12 U.S.C. § 1846, permits the application of Ky. Rev. St. 287.030(4) to the plaintiff banks.[5] Section 7 provides, "No provision of this chapter shall be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to companies, banks, bank holding companies, and subsidiaries thereof." 12 U.S.C. § 1846. The Commissioner and the associations both misread and misinterpret this section.

This section did not grant any additional regulatory powers to the states. It merely preserved the powers extant at the time of enactment and such powers as may exist in the future. It neither enlarged nor diminished state regulatory powers with respect to national banks or bank holding companies. *American Trust Co., Inc.* v. *South Carolina*

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[5]In addressing this argument, the court again notes that each of the plaintiff banks is a wholly owned subsidiary of a bank holding company. [Record #25, 26, 27]. It is not clear whether these holding companies are Kentucky corporations.

State Board of Bank Control, 381 F.Supp. 313, 324 (D.S.C. 1974). The legislative history of the BHCA clearly reflects Congressional intent that it have a neutral effect on the dual system of banking regulation. This was the purpose for the inclusion of Section 7. *See Control and Regulation of Bank Holding Companies: Hearings on H.R. 2674 Before the House Comm. on Banking and Currency,* 84th Cong., 1st Sess. 366-67 (1955).

Since *McCullough* v. *Maryland,* 4 Wheat. 316 (1819), it has been beyond doubt that Congress can establish and regulate a national system of banks. Only where Congress has explicitly provided for state regulation of national banks has such regulation been permitted. Otherwise, a state cannot prevent a national bank from exercising its express powers. *See Franklin Nat. Bank* v. *New York,* 347 U.S. 373, 378 (1954).

Congress has typically permitted state regulation when it acts to preserve the dual system of banking in the United States, such as in Congressional treatment of branch banking for national banks. *See* 12 U.S.C. § 36; *First Nat. Bank in Plant City Fl.* v. *Dickinson,* 396 U.S. 122 (1969). Congress could have permitted national banks to conduct branching activities regardless of state law. *Cf. Lyons Savings & Loan Ass'n* v. *Federal Home Loan Bank Board,* 377 F.Supp. 11, 20 (N.D. Ill. 1974). However, it chose not to give national banks a competitive advantage over state banks.

In contrast, this case concerns an express power of certain national banks; a power granted by Congress, in the exercise of its unquestioned power to regulate the national banking system. The statute granting the power to sell insurance contains no language permitting states to absolutely prohibit of the exercise of this power by national banks. The only condition placed on the ability of these national banks to sell insurance is the requirement that

the involved insurer be licensed to do business in the state by the appropriate state authorities. In short, 12 U.S.C. § 92 grants an express power to national banks which states could not eliminate when the BHCA was enacted, and cannot eliminate now.

Having determined that 12 U.S.C. §1846 does not grant additional power to directly regulate national banks, the question then becomes whether states can regulate indirectly what they cannot regulate directly. This would be the end result if states were permitted to veto an express power of a national bank by virtue of their ability to regulate bank holding companies. This is an illogical result.

There is absolutely no doubt that Ky. Rev. St. 287.030(4) is a permissible regulation of bank holding companies. However, there is also no doubt that a statute which expressly prohibited all banks operating in Kentucky from selling insurance would be an unconstitutional violation of the Supremacy Clause. U.S. Const., art. VI, cl. 2. Such a statute would directly conflict with federal law, and a national bank would not be subject to such regulation. *National State Bank, Elizabeth, N.J.* v. *Long*, 630 F.2d 981, 987 (2nd Cir. 1980). The authority given to states to regulate bank holding companies does not give them any additional authority to regulate national banks simply because the national bank may happen to be a subsidiary of a bank holding company. Any authority a state has to regulate a national bank derives either from a specific grant of authority under federal law, or from the lack of an inconsistent federal law. It does not derive from the bank's form of ownership.

The Commissioner may regulate bank holding companies and their national bank subsidiaries. However, the BHCA does not permit the Commissioner to prohibit the exercise of an express power granted by Congress, without limitation, to national banks. Refusal to provide the requested applictions [sic] constitutes such an improper prohibition. This argument is without merit.[6]

V. The Existence of 12 U.S.C. §92

Relatively late in the briefing of this case, an issue was presented to the court regarding the continued existence of 12 U.S.C. § 92. In *Independent Insurance Agents of America, Inc.* v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), the court concluded that Congress inadvertently repealed this section in 1918. One other court has addressed this issue, reaching the opposite result. *See American Land Title Ass'n* v. *Clarke*, Docket No. 91-6235 (2nd Cir. June 15, 1992). Not surprisingly, each side in the present case argues strenuously that the case which supports their position was correctly decided, while the other decision was poorly reasoned. This leaves the court with little choice but to examine the issue anew.

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[6]The authority cited by the Commissioner and the associations in support of this argument is inapposite since the cases either deal with a state's ability to regulate bank holding companies or to exercise regulatory authority over national banks as permitted under federal law. This court takes issue with neither of those state powers. *See Commercial Nat. Bank of Little Rock* v. *Board of Governors of the Federal Reserve System*, 451 F.2d 86 (8th Cir. 1971) (regulation of bank holding companies and branch banking); *Bank of New Orleans & Trust Co.* v. *Saxon*, 221 F.Supp. 576 (D.D.C. 1962), *aff'd* 323 F.2d 290 (D.C. Cir. 1963); *rev'd on jurisdictional grounds*, 379 U.S. 411 (1965) (regulation of bank holding companies); *Security Nat. Bank & Trust Co.* v. *First W. Va. Bancorp, Inc.*, 277 S.E.2d 613 (W. Va. 1981), *appeal dismissed*, 454 U.S. 1131 (1982) (regulation of bank holding companies); *Whitney Nat. Bank in Jefferson Parish* v. *James*, 189 So.2d 430 (La. App.), *appeal denied*, 191 So.2d 140 (1966) (regulation of bank holding companies and branch banking); *Braeburn Securities Corp.* v. *Smith*, 153 N.E.2d 806 (Ill. 1958), *appeal dismissed*, 359 U.S. 311 (1959) (regulation of bank holding companies).

For the sake of brevity, the court will not engage in a lengthy explication of the relevant legislative history. Rather, the court will simply state that it has examined the materials provided by the parties in support of their respective positions. Having reviewed the legislative history and studied the reasoned opinions of both the District of Columbia Circuit Court of Appeals and the Second Circuit Court of Appeals, this court agrees with the rationale of the Second Circuit. Accordingly, that part of the Second Circuit Opinion headed "A. Validity of 12 U.S.C. § 92" is adopted by this court the same as if set forth herein. *Id.*, at 2-10.

This court's examination of the legislative history of § 92 would have led it to the same conclusion quite apart from the Second Circuit's decision. To determine that § 92 has been repealed would be to circumvent logical statutory construction. This court also holds that "section 92 remains valid law." *Id.*, at 10.

VI. Preemption

Having determined that 12 U.S.C. § 92 continues to exist with the full force of law, the court now turns to the question of whether this section preempts Ky. Rev. St. 287.030(4). At the outset, the court again notes that § 92 grants to national banks located in towns with less than 5,000 persons the express power to act as insurance agents. National banks are not subject to attempted state control which would directly conflict with laws of the United States. *Starr* v. *O'Connor*, 118 F.2d, at 555.[7]

[7]The court takes no position on whether the express language of Ky.Rev.Stat. 287.030(4) permits its application directly to national banks. It is sufficient for the purpose of this inquiry that the Commissioner has applied it in such a manner.

In addressing the question of preemption, the Commissioner and the associations are correct that the standard for preemption does not change simply because national banks are involved. Under the Supremacy Clause of the Constitution, Art. VI, cl. 2, any state law which conflicts with federal law is "without effect." *Maryland* v. *Louisiana*, 451 U.S. 725, 746 (1981). However, "consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" *Cipollone* v. *Liggett Group, Inc.*, 60 U.S. L.W. 4703, 4706 (1992), *quoting Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Accordingly, the Congressional purpose for the enactment is the ultimate determining factor in the preemption analysis. *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978).

As articulated in *Cipollone*, there are three principal ways for Congress to signal the paramount authority of federal law in a particular area. *Cipollone*, 60 U.S.L.W., at 4706-07. First, Congressional intent of supremacy may be expressly stated in the language of the statute or implicitly contained in its structure and purpose. *Jones* v. *Ruth Packing Co.*, 430 U.S. 519, 525 (1977). Second, in the absence of express Congressional guidance, state law will be preempted if it actually conflicts with federal law. *Pacific Gas & Elec. Co.* v. *Energy Resources Conversation and Development Comm'n*, 461 U.S. 190, 204 (1983). Finally, contrary state laws may be preempted if federal law has so thoroughly occupied a field as to allow a reasonable inference that Congress intended no state law to supplant federal authority. *Fidelity Federal Savings & Loan Ass'n* v. *De la Cuesta*, 458 U.S. 141, 153 (1982).

The Commissioner and the associations are correct that there is no express statement of supremacy in § 92, nor

has Congress occupied the entire field of national bank regulation. However, § 92 does appear to squarely conflict with Ky. Rev. St. 287.030(4), as it has been interpreted by the Commissioner.

The Commissioner and the associations contend that there is no actual conflict between § 92 and the state statute and raise three arguments in support of that position. For an actual conflict to exist, it must be a physical impossibility to comply with both the federal and state statutes. *Hillsborough County, Fla.* v. *Automated Medical Labs, Inc.*, 471 U.S. 707, 713 (1985).

First, the Commissioner and the associations maintain that the two statutes can be easily reconciled. This argument attempts to weaken the express language of § 92, by massaging the Commissioner's 1986 position that § 92 merely provides that this insurance activity is not *ultra vires* to a national bank's charter. *See* Letter from Assistant General Counsel Stephen B. Cox to David F. Presser (February 28, 1986) [Record #16, Tab 7]. Section 92 itself disposes of this argument. If a national bank meeting the requirements of § 92 wishes to exercise the power granted to it under this statute, it cannot do so under the present interpretation of Kentucky law by the Kentucky Insurance Commissioner.

Indeed, the scant legislative history of § 92 itself reveals that the primary intent of § 92 was not to place national banks on the same footing as state banks in states where state banks were permitted to sell insurance. Rather, the primary intent was to strengthen small national banks by providing them with an additional source of revenue. *See* Letter from Comptroller John Skelton Williams to Senator Robert Owen (June 8, 1916) [included at 53 Cong. Rec. 11001]. There is no indication that Congress intended that § 92 would only apply where it was needed to allow national banks to compete with state banks. There is ab-

solutely no authority for the Commissioner's pseudo *ultra vires* argument. It is indeed impossible to reconcile these two provisions.

Second, the Commissioner and the associations contend that Ky.Rev. St. 287.030(4) does not purport to regulate national banks. Instead, they contend that the statute only regulates the licensure of insurance agents within the Commonwealth, based upon their affiliation with bank holding companies. This argument is disingenuous at best, and erroneous at worst. The section is included within a statute addressed to limitations on the powers of banks, and is contained in the chapter of the Kentucky Revised Statutes dedicated to banks and trust companies. It is an attempt to regulate bank holding companies, and, by interpretation, their national bank subsidiaries. It is, at best, an indirect regulation of insurance licenses. As interpreted by the Commissioner, it is in direct conflict with a federal statute and is preempted.

Finally, the Commissioner and the associations argue that Ky. Rev. Stat. 287.030(4) is consistent with the objectives of Congress in enacting § 92. This relies upon a statement in Comptroller Williams' letter which refers to allowing national banks to become more competitive with state banks which are authorized to engage in nonbanking activities. However, this court's reading of the Williams letter indicates that the primary objective was to ensure profitability for smaller national banks which would allow them to both lend money at nonusurious rates and make a better return to their stockholders. Comptroller Williams did not specifically reference the ability of state banks to engage in the business of insurance, but merely pointed out that some state banks were able to carry on nonbanking activities. Recognizing that fact, he could have recommended that language be included which limited the exercise of this power to states where both national and state

banks could engage in insurance activities. However, no such limitation was included. Reflecting the desire to provide an additional revenue source to national banks, § 92 was drafted to apply to all national banks meeting its requirements. Ky. Rev. Stat. 287.030(4) is not consistent with Congressional objectives in enacting § 92.

The court has no difficulty concluding that § 92 preempts Ky. Rev. Stat. 287.030(4). To the extent that the Commissioner interprets the Kentucky statute to prohibit national banks in Kentucky from utilizing § 92, that interpretation is in direct conflict with federal law. The Commissioner is attempting to prevent national banks from participating in the sale of insurance simply because they are banks. This is contrary to the Congressional enactment. Congress clearly knew how to defer to state regulatory authority over national banks. It did so in permitting states to determine whether national banks within their borders could engage in branch banking. 12 U.S.C. § 36. There is no such deference contained in § 92. The state statute, as interpreted, must give way in the face of contrary federal law. *Davis* v. *Elmira Savings Bank*, 161 U.S. 275 (1896). The plaintiff banks may not be prevented from applying for insurance licenses.

VII. The McCarran-Ferguson Act

Finally, the Commissioner and the associations argue that Ky. Rev. Stat. 287.030(4) is a valid exercise of state authority under the McCarran-Ferguson Act. 15 U.S.C. §§ 1011-1015. This act was passed in response to the Supreme Court's decision in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which held that insurance companies were subject both to regulation by Congress and to federal anti-trust laws.

At issue in this case is 15 U.S.C. §1012(b) which provides:

> (b) Federal regulation. No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the Purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.

It is perhaps simpler to address this statute in reverse order and first examine whether 12 U.S.C. § 92 is an Act of Congress which relates to the business of insurance.

The "business of insurance" has been narrowly defined, and it seems fairly obvious that § 92 does not constitute Congressional regulation of that business. This section is a part of the National Bank Act, and its function is to grant additional powers to national banks. That the power granted to the national banks involves insurance does not transform this section into a regulation of the business of insurance. Accordingly, § 92 will not invalidate the Kentucky statute on these grounds.

Moreover, the other portion of 15 U.S.C. 1012(b) is equally inapplicable to this case. Just as § 92 does not regulate the business of insurance, neither does Ky. Rev. Stat. 287.030(4) constitute insurance regulation. As previously mentioned, this statute regulates bank holding companies, and is contained in chapter of the Kentucky Revised Statutes regulating banks and trust companies. It does not appear in the portion of the Kentucky Revised Statutes which regulates insurance. It relates to the powers of bank holding companies, not to the powers of insurance companies or agents.

To determine whether a state law or regulation governs the "business of insurance", the Supreme Court has articulated a three-part test. The court must consider:

> [F]irst, whether the practice has the effect of transferring or spreading a policyholder's risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; and third, whether the practice is limited to entities within the insurance industry.

Union Labor Life Ins. Co. v. *Pireno*, 458 U.S. 119, 129 (1982). Applying these criteria to the present case, the court reaches the inescapable conclusion that Ky. Rev. St. 287.030(4) does not regulate the business of insurance. The Kentucky statute is not concerned with transferring or spreading the risk of any policyholders, nor does bank holding company ownership of insurance entities constitute an integral part of the policy relationship between the insurer and the insured. Finally, bank holding companies are not entities within the insurance industry. The McCarran-Ferguson Act has no applicability to the issue now before the court. *See United States Auto Ass'n* v. *Muir*, 792 F.2d 356 (3rd Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

VIII. Conclusion

Based upon the foregoing analysis, the court believes that the Commissioner is required to provide the plaintiff banks, and other similarly situated national banks, with applications for insurance licenses. The Commissioner's interpretation of law reflected in this litigation is incorrect.[8]

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[8]The court specifically declines to determine whether the Commissioner is required to issue licenses once the completed applications are received. Whether national banks are subject to Kentucky's criteria for the issuance of an insurance license is not properly before the court, and may well implicate McCarran-Ferguson in other respects. In any event, the court need not reach this issue in narrowly deciding that Ky.Rev.Stat. 287.030(4), as interpreted, is preempted by 12 U.S.C. §92, and does not permit the Commissioner to refuse to provide the requested applications.

This memorandum opinion and order contains the court's rulings on all pending motions except the motions for summary judgment which will be addressed by separate order. The court having considered the record and being otherwise sufficiently advised,

Accordingly,

IT IS HEREBY ORDERED:

(1) that the Commissioner's motion to dismiss, [Record #4], be, and is **DENIED**, in conformity with the reasons stated herein;

(2) that the associations' motion to dismiss [Record #7], be, and is **DENIED**, in conformity with the reasons stated herein; and

(3) that the plaintiffs' motion for leave to file a memorandum of supplemental authorities, [Record #43], be, and is **GRANTED**.

This 4th day of August, 1992.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

Civil Action No. 91-3

THE OWENSBORO NATIONAL BANK, et al., - - *Plaintiffs,*
and
THE UNITED STATES OF AMERICA, - *Intervenor-Plaintiff,*
v.
ELIZABETH P. WRIGHT, Commissioner, Department of Insurance, Commonwealth of Kentucky - - - - - *Defendant,*
and
KENTUCKY STATE ASSOCIATION OF LIFE UNDERWRITERS, et al., - - - - *Intervenors.*

DECLARATION

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss

I, ROSA M. KOPPEL, being duly sworn, depose and say:

(1) I am a Senior Trial Attorney in the Litigation Division at the office of Comptroller of the Currency ("OCC"). I have been employed by the OCC since July 9, 1984, and am a member in good standing of the New York State and District of Columbia Bars.

(2) The OCC has primary supervisory responsibility over the activities of all national banks operating in the United States. *See* 12 U.S.C. §§ 1, *et seq.*

(3) I make this declaration upon the basis of information provided to me by OCC's Communications Division and a letter from Michael F. Crotty, Deputy General Counsel for Litigation, American Bankers Association, to Lester N. Scall, Senior Trial Attorney, dated April 3, 1992, a true copy of which is attached hereto as Exhibit "A".

(4) According to the most recent statistics maintained by OCC, as of December 31, 1991, there are 3,778 national banks reporting to the OCC.

(5) Exhibit "A" to my declaration contains the results of a recent survey of the various state bankers' associations conducted by the American Bankers Association. The purpose of the survey was to determine how many national and state banks are conducting the insurance agency activities authorized by 12 U.S.C. § 92.

(6) According to the survey results, there are as many as 179 national banks in fifteen states throughout the nation conducting insurance agency activities pursuant to 12 U.S.C. § 92.

(7) In addition, from the information presently available, there are at least 115 state-chartered banks conducting insurance activities pursuant to state statutes that allow them to engage in the same activities that are authorized for national banks.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 14th day of April, 1992.

/s/ ROSA M. KOPPEL
ROSA M. KOPPEL
Senior Trial Attorney
Litigation Division

EXHIBIT "A"

[LETTERHEAD OF AMERICAN BANKERS ASSOCIATION]

April 3, 1992

Lester N. Scall, Esq.
Litigation Division
Office of the Comptroller of the Currency
Independence Square
250 E Street, SW
Washington, DC 20219

Re: *IIAA* v. *Clarke*

Dear Les:

This is an update of my March 9 letter to you. It differs from the March 9 letter only in minor respects. As I told you in that letter, the ABA has asked the various state bankers' associations around the country to examine into the insurance activities of their respective members in order to determine how many banks, nationwide, are relying upon the authority of Section 92 of the National Bank Act—either directly in the case of national banks or indirectly in the case of state chartered banks in those states where there is a "parity" or "wild card" statute, but no other independent source of statutory authority for general insurance agency powers. The results of that survey are as follows:

	National Banks	State Banks
Arkansas	7	N/A
California	3	N/A
Delaware	1	N/A
Indiana	1	N/A
Iowa	17	N/A
Kansas	34	
Maryland	0	4
Minnesota	50 (approximate)	N/A
Missouri	2	3
New York	5 (approximate)	N/A
North Dakota	16	105
Oregon	3	N/A
South Carolina	10 (approximate)	N/A
South Dakota	12	N/A
Utah	0	2 or 3
Virginia	3	N/A
Washington	10 to 15	N/A

Alabama, Alaska, Arizona, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, and West Virginia report no known use of the "town of 5000" rule, either by national or state chartered banks. The Kansas number is a total of state and national banks; that state's bankers association is unable to differentiate between the two on short notice. The remaining states have not supplied any useful information to us.

Sincerely,

/s/ MICHAEL F. CROTTY
MICHAEL F. CROTTY

No. 92-484

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON
Petitioner,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL.,* IN SUPPORT OF THE PETITIONER

JOHN J. GILL III
Counsel of Record

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November 20, 1992

[*Complete List of sponsoring organizations and counsel on inside of cover.]

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QUESTION PRESENTED

Whether the inadvertent clerical misplacement of quotation marks in an enrolled statute in 1916 can effect the repeal of Section 92 of the National Bank Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-484

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF THE PETITIONER

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioners in accordance with the provisions of Rule 37.2 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The national and state-based trade associations sponsoring this brief together represent virtually

every commercial bank in the United States and most of their holding companies (if any) as well.

Commercial banks have relied upon the continued existence of Section 92 of the National Bank Act for the past three-quarters of a century in order to act as general insurance agents in small towns throughout much of the country. It has been an entirely reasonable reliance, since the Comptroller of the Currency, the principal regulator of national banks, has treated the law as remaining in full force and effect, as have the courts, state and federal (including this Court), that have had occasion to deal with the issue, and as has the United States Congress, which has purported to amend Section 92 in two instances. It is a reliance that is not limited to national banks. The laws of approximately 37 states confer upon their own state chartered banks, in addition to their specifically enumerated powers, other powers that are available to national banks under federal law.

It has proven to be extraordinarily difficult to determine the exact number or identity of commercial banks operating insurance agencies under the direct or indirect authority of Section 92. No official records are compiled or kept, but efforts have been made to survey the industry by various parties. The Comptroller's Petition for Writ of Certiorari places the number of national banks doing so at between 90 and 100, and correctly relates that the American Bankers Association and Oregon Bankers Association have estimated a number in the range of 160. (*Steinbrink v. Independent Insurance Agents of America*, No. 92-507, Petition for Writ of Certiorari at 19, n. 11). The United States District Court for the Eastern District of Kentucky, in related litigation, has found that ap-

proximately 179 national banks in fifteen states exercise insurance powers pursuant to Section 92. (*Owensboro National Bank v. Moore*, No. 91-3, slip op. at 10 (E.D. Ky. 1992) (*appeal pending*, Nos. 92-6330, 6331, 6th Cir.)). A 1990 study performed for the Independent Bankers Association of America suggests that the number could be considerably higher than that. (1991 Bank Insurance Activities Survey Conducted by The Independent Bankers Association of America & The Wyatt Company (1990) at 7-10).

In addition to the national banks acting under direct authority of Section 92, the American Bankers Association has identified approximately 130 state-chartered banks, located in small towns. that are offering insurance services to their customers where the only statutory authority to do so is a state law providing that state-chartered banks may provide to their customers whatever services a national bank in the state can provide to customers.

Whatever the exact number of banks, state and national, that have taken advantage of the statutory grant of power to banks located and doing business in small towns, it is clear that this participation is considerable, widespread, and growing. (*See, e.g., Owensboro National Bank v. Moore, supra*, in which three national banks not presently engaged in the insurance business from their locations in small towns are struggling mightily, over the opposition of the insurance industry, to utilize the powers granted by the statute.)

It is to protect the present and future interests of their respective members in the conduct of insurance activities in small towns that the American Bankers Association, Association of Bank Holding Companies, Association of Banks in Insurance, Consumer Bankers

Association, Independent Bankers Association of America, Kansas Bankers Association, Minnesota Bankers Association, Missouri Bankers Association, Oregon Bankers Association and Wisconsin Bankers Association respectfully appear in this case in order to urge the Court to grant the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

I. The Conflict Among The Circuits

In the case below, the District of Columbia Circuit held that Section 92 of the National Bank Act, enacted in 1916, was effectively repealed two years later in the context of the enactment of the totally unrelated War Finance Corporation Act. *Independent Insurance Agents of America v. Clarke*, 955 F.2d 731, 739 (D.C. Cir. 1992). Four months after the D.C. Circuit opinion, the Second Circuit explicitly rejected the District of Columbia Circuit's decision, holding that whatever it is that happened in 1918 did *not* effect a repeal of Section 92. *American Land Title Association v. Clarke*, 968 F.2d 150, 152 (2d Cir. 1992), *petitions for cert. pending*, Nos. 92-482, 92-645. Rule 10.1(a) of the Supreme Court Rules provides that one of the "special and important reasons" that will be considered by the Court in granting review on writ of certiorari is "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter."

Section 92 of the National Bank Act was enacted as a part of a then new version of Section 13 of the Federal Reserve Act—a section of the law that also amended a pre-existing, substantively unrelated statute, Revised Statutes section 5202. The placement of a pair of quotation marks in the 1916 statute has given rise to a longstanding academic dispute over the question whether Section 92 was thereby placed within the text of the amended R.S. section 5202 or within the text of Section 13 of the Federal Reserve Act separately from R.S. section 5202. When Congress passed the War Finance Corporation Act (Pub. L. No. 65-121, 40 Stat. 506) in 1918, it re-enacted (with an amendment) R.S. section 5202, without including in the amended text the words of Section 92, leading to the argument that Section 92 was repealed at that time.

Notwithstanding that, every court that has had occasion to interpret and apply Section 92 in the past seventy-five years has treated the law as if it has continued to exist in full force and effect—until the District of Columbia Circuit's decision in the case below. Not only is the Circuit opinion in direct conflict with the Second Circuit's recent opinion, but it is in conflict with all of the other court opinions as well:

- In *Commissioner of Internal Revenue v. First Security Bank of Utah*, 405 U.S. 394, 401-405 (1972), this Court observed that Section 92 had been omitted from the U.S. Code in recent editions, but that the Comptroller of the Currency still considered the law to be in effect. The Court then proceeded to act as if the Comptroller were correct by not attributing income from the sale of insurance to banks that, under Section 92, could not lawfully receive such income.

- In *Commissioner of Internal Revenue v. W. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966), the court examined the tax consequences when, in fur-

therance of a merger into a national bank, a state bank was compelled—by Section 92—to spin off its insurance department.

• In *First National Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261-62 n.6 (5th Cir. 1980), the court acknowledged the "considerable discussion" over the correctness of the U.S. Code's omission of Section 92 since 1952, and concluded that the "issue appears to be resolved" in favor of Section 92's continued existence, so much so that "[u]nder these circumstances, further discussion of the issue seems moot." (*See also Saxon v. Georgia Association of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968), in which the existence of Section 92 was unquestionably the necessary predicate to the court's conclusions of law.)

• *Salyersville National Bank v. United States*, 613 F.2d 650, 652 (6th Cir. 1980), was another tax case in which the court followed this Court's *First Security* precedent, noting that "banks in cities over 5000 population had been and were then barred from selling insurance by federal banking law, 12 U.S.C. § 92."

• In *Independent Insurance Agents of America v. Board of Governors of the Federal Reserve System*, 736 F.2d 468, 476-77 (8th Cir. 1984), the very same party who is the Respondent here argued that Section 92 of the National Bank Act prohibited national banks in towns with a population over 5000 from acting as insurance agents. Necessary to that argument, of course, is that Section 92 existed in 1984. The Eighth Circuit did not dismiss the argument out of hand, but rather, acting as if Section 92 existed, concluded that it would not be violated by the Federal Reserve's approval of certain insurance activities of two bank holding companies that were sufficiently separated

from the bank subsidiaries of the holding companies so that the activities would not be viewed as those of the banks.

• Even the District of Columbia Circuit itself has, in recent past, acted inconsistently with its new view that Section 92 does not exist. In *Independent Bankers Association of America v. Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), the court held that the incidental powers clause of the National Bank Act, 12 U.S.C. § 24(Seventh), authorized national banks to act as agent in the sale of credit life insurance, wherever the banks were located. The court analyzed Section 92 and concluded that "by its own terms [section 92] does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." (*Id.* at n.18) The court would not have bothered saying that if Section 92 did not exist. Moreover, it is not an adequate answer to say that no one in *IBAA v. Heimann* asked the court to rule on the existence of Section 92. No one asked the District of Columbia Circuit to rule on that matter in this case either.[1]

---

[1] In addition to these Supreme Court and U.S. Court of Appeals decisions, lower federal courts and state courts have discussed, relied on or cited Section 92 innumerable times without ever concluding that it had been repealed. *See Variable Annuities Life Insurance Co. v. Clarke*, 786 F. Supp. 639 (S.D.Tex. 1991), *appeal pending*, No. 92-2010, 5th Cir.; *Owensboro National Bank v. Moore*, No. 91-3 (E.D.Ky. 1992), *appeal pending*, Nos. 92-6330, 6331, 6th Cir.; *Thompson v. Kerr*, 555 F. Supp. 1090, 1096 (S.D. Ohio 1982); *Guaranty Mortgage Co. v. Z.I.D. Associates*, 506 F. Supp. 101, 104(S.D.N.Y. 1980); *Exchange Bank of Commerce v. Meadors*, 199 Okla. 10, 184 P.2d 458, 464 (1947); *Washington Agency Inc. v. Forbes*, 309 Mich.

In light of all the contrary authority, one would almost be tempted to dismiss the District of Columbia Circuit opinion as an aberration, unlikely to recur or be followed elsewhere, except for the fact that the District of Columbia is the home circuit to the Comptroller of the Currency who may be sued there anytime he approves a proposed activity of a national bank pursuant to Section 92, or anytime he promulgates a rule regarding the insurance activities of small town banks in the exercise of the rulemaking powers granted him by Section 92. The insurance industry has already enunciated its intent to follow precisely that strategy. *See* Defendant's and Intervenors' Joint Opposition and Response to Plaintiffs' Memorandum of Supplemental Authorities, *Owensboro National Bank v. Wright*,[2] Civil Action No. 91-3 at 5-6 n.3 (February 1992). The conflict needs to be resolved.

II. The Important Question of Federal Law

We have already pointed out above that the decision of the District of Columbia Circuit below imminently threatens the business operations and settled expectations of a great many state and national banks and their customers. That is coupled with the confusion within the industry and the industry's regulators, state and federal, engendered by two diametrically opposed U.S. Courts of Appeals decisions coming within a few

683, 16 N.W.2d 121, 122 (1944); *Marshall National Bank v. Corder*, 169 Va. 606, 194 S.E. 734, 736 (Va.Ct. App. 1938); *Greene v. First National Bank of Thief River Falls*, 172 Minn. 310, 215 N.W. 213 (1927).

[2] This case has subsequently become known as *Owensboro National Bank v. Moore*, upon replacement of the Insurance Commissioner.

months of one another. Further adding to the equation is the pendency of other litigation in the Fifth and Sixth Circuits[3] that would clearly benefit from this Court's resolution of the issue one way or the other. All together, these factors make this an important question to the business and governmental interests of many parties.

But there is also a question raised in the Circuit opinion that is an important one in a legal sense as well. It is the court's perception of its role in construing and applying statutes. The District of Columbia Circuit was unwilling to "correct[] flaws in the language and punctuation of federal statutes" where to do so would be "to reinstate a law that, intentionally or unintentionally, Congress has stricken from the statute books." *Independent Insurance Agents of America v. Clarke*, 955 F.2d at 739.

The court's opinion *presumes* that Congress has stricken the laws from the books, *presumes* that "correcting" punctuation errors would have the effect of "reinstating" the law. But in point of fact, proper application of the rules of statutory construction should lead to the conclusion that the law was not repealed in the first place.

We begin with the a proposition set forth by this Court long ago: "The intent, not the letter of the statute, constitutes the law." *Union National Bank of St. Louis v. Matthews*, 98 U.S. 621, 626 (1879). The opinion of the court below gives *no* regard to the intent of Congress—either in 1916 when it enacted Section 92, or in 1918 when it enacted the War

[3] See n. 1 above.

Finance Corporation Act. The District of Columbia Circuit found that the latter repealed the former whether Congress intended that result or not.

This Court has also often invoked "the plain language of the statute itself" as a means of finding and effectuating Congressional intent, not as an end in itself. *See, e.g., Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-75 (1986); *Richards v. United States*, 369 U.S. 1, 9 (1962).

Finally, this Court has held that language is language. It does not include punctuation:

> Punctuation marks are *no part of an act*. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed.

United States v. Shreveport Grain and Elevator Co., 287 U.S. 77, 82-83 (1932)(emphasis added).

> So little is punctuation a part of statutes that courts will read them with such stops as will give effect to the whole.

Crawford v. Burke, 195 U.S. 176, 192 (1904).

An examination of the *language* of the applicable statutes shows clearly that Section 92 of the National Bank Act was never placed within Revised Statutes section 5202, so that the subsequent changes to section 5202 had no effect upon Section 92.[4] An ex-

[4] The court below printed the applicable statutes as appendices to its opinion. We reproduce those appendices as appendices to this brief as well for convenience.

amination of the origin of the misplaced quotation marks clearly shows them to be an act of a scribe and not an act of Congress.

Section 5202 of the Revised Statutes of the United States was enacted in 1878, derived from Section 36 of the National Bank Act of 1864 which, in turn, was derived from Section 42 of the National Bank Act of 1863. Generally, it forbade any national bank to be indebted in an amount exceeding its paid-in capital, and then set forth four short exceptions to that general rule.

In 1913, Congress enacted the Federal Reserve Act, Pub. L. 63-64, 38 Stat. 251 (1913). Section 13 of the Act contained a series of unnumbered paragraphs, the sixth one of which amended R.S. section 5202. That paragraph contained five numbered subparagraphs. The first four of them essentially duplicated the original four exceptions to the general prohibition against excess indebtedness of national banks; the fifth one was a new exception for "[l]iabilities incurred under the provisions of *the Federal Reserve Act*" (emphasis added). After the fifth numbered subparagraph, there began a new unnumbered paragraph, authorizing the Federal Reserve Board to adopt restrictions, limitations and regulations upon the rediscount by a Federal Reserve bank of certain bills receivable, foreign bills of exchange and acceptances "authorized by *this Act*" (emphasis added). (See Appendix A.)

The statute clearly did not make R.S. section 5202 a part of the Federal Reserve Act; otherwise the internal reference to "the Federal Reserve Act" in the fifth numbered subparagraph would have been superfluous. Similarly, the unnumbered paragraph following the fifth numbered subparagraph was not made

a part of R.S. section 5202. If it had been intended to be a continuation of the fifth numbered subparagraph, the internal reference to "this Act" would have made no sense whatsoever. R.S. section 5202 contained no authorization of bills of exchange or acceptances. Such an authorization was found in the second and third unnumbered paragraphs of section 13 of the Federal Reserve Act.

In summary, the amendment to R.S. section 5202 was contained only in the sixth unnumbered paragraph including the five numbered subparagraphs. The seventh unnumbered paragraph, like the first five, was part of the then new Federal Reserve Act.

In 1916, Congress amended the Federal Reserve Act. Among other things, the 1916 statute set forth a new version of section 13 of the Act "to read as follows:" The new version (*See* Appendix B) followed the same format as the prior version, containing a series of unnumbered paragraphs. Each of those paragraphs—with one exception—was preceded by quotations marks, which was the grammatically correct thing to do after the phrase "to read as follows." The exception, of course, is what gives rise to the difficulty here. The unnumbered paragraph carrying forward the three-year old amendment to R.S. section 5202 was not preceded by a quotation mark. Textually, this unnumbered paragraph and its five numbered subparagraphs remained unchanged (except the 1916 version refers, in the fifth subparagraph, to the "Federal reserve Act," whereas in the 1913 version, the second word of that phrase also had an initial capital letter). The unnumbered paragraph following the five numbered exceptions was a modification of the same paragraph as had appeared in the 1913 ver-

sion of the Federal Reserve Act. It now provided for the discount, purchase and sale, as well as the rediscount of the same bills receivable, bills of exchange and acceptances "authorized by *this Act*." Again, despite the placement of quotation marks in the 1916 statute, there was no authorization in R.S. section 5202, as amended, for any such bills or acceptances.

As was earlier the case, that authorization appeared only in the Federal Reserve Act itself. Likewise as was earlier the case, R.S. section 5202's fifth numbered exception referred not to "this Act," but rather to "the Federal reserve Act," as a separate and distinct statute. The clear import of the *words* used, therefore, is that the unnumbered paragraph following the five exceptions was not a part of R.S. section 5202. Once that break is made, it is logical and grammatical to assume conclusively that unnumbered paragraphs following the bills of exchange and acceptances paragraph are likewise not part of R.S. section 5202. The unnumbered paragraph immediately following the bills of exchange and acceptances paragraph is the enactment of what subsequently became identified as section 92 of the National Bank Act.

That the placement of the quotations marks in the enrolled statute is an act of a scribe rather than an Act of Congress is beyond question. Lodged with this brief as an Exhibit are copies of the Senate and House Conference Reports on "An Act to amend the Act approved December twenty-third, nineteen hundred and thirteen, known as the Federal Reserve Act, by adding a new section." The Senate version of the Conference Report contains no quotation marks in any relevant spot; the House version of the Conference Report contains handwritten quotation marks,

but in relevant part, those quotation marks are not where they eventually appear in the enrolled statute. The unnumbered paragraph preceding the revision to R.S. section 5202 does not end in a quotation mark in either the House or Senate version of the Conference Report, but it does in the enrolled statute. The paragraph of the bill pertaining to R.S. section 5202 begins with a quotation mark in the House version of the Conference Report, but the enrolled bill does not. If *either* the Senate version or the House version had made it to the enrolled bill, we would not be here.

The War Finance Corporation Act, in relevant part, re-enacted R.S. section 5202 with a new sixth exception (*See* Appendix C). It did not pertain to the insurance powers and did not repeal those powers since, as indicated above, Section 92 was not a part of R.S. section 5202.

The words of the 1916 statute, with the internal references to "this Act" and "the Federal reserve Act," make sense if and only if the paragraphs following those that obviously amend R.S. section 5202 are not deemed to be made a part of R.S. section 5202. The plain language of the statute must control, not peculiar quotation marks of unknown origin which would have the effect of making portions of the statute gibberish.

CONCLUSION

For all of the reasons stated herein and in the Petition for Writ of Certiorari, we respectfully urge that the Petition be granted.

Respectfully submitted,

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November 20, 1992

APPENDIX

APPENDIX A

Section 13 of Federal Reserve Act of 1913

POWERS OF FEDERAL RESERVE BANKS.

Sec. 13. Any Federal reserve bank may receive ....

* * *

Any member bank may accept drafts or bills of exchange drawn upon it and growing out of transactions involving the importation or exportation of goods having not more than six months sight to run; but no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half its paid-up capital stock and surplus.

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

First. Notes of circulation.

Second. Moneys deposited with or collected by the association.

Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

The rediscount by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

APPENDIX B

1916 Amendments to Federal Reserve Act of 1913

CHAP. 461.—An Act To amend certain sections of the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen, be, and is hereby, amended as follows:

* * *

That section thirteen be, and is hereby amended to read as follows:

* * *

"Any Federal reserve bank may make advances to its member banks on their promissory notes for a period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States."

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise,

except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal reserve Act.

"The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

"That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; . . . *Povided* [sic], *however,* That no such bank shall in any case guarantee . . . the payment of any premium on insurance policies issued through its agency by its principal: *And provided*

further, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

"Any member bank may accept drafts or bills of exchange drawn upon it . . . *Provided further*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

APPENDIX C

Section 20 of the War Finance Corporation Act of 1918

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I.—WAR FINANCE CORPORATION.

* * *

Sec. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"Sec. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association or dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

Nos. 92-484 and 92-507

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
PETITIONER
v.
INDEPENDENT INSURANCE AGENTS OF
AMERICA, INC., ET AL.

STEPHEN R. STEINBRINK, ACTING COMPTROLLER
OF THE CURRENCY, ET AL., PETITIONERS
v.
INDEPENDENT INSURANCE AGENTS OF
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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

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QUESTION PRESENTED

Whether 12 U.S.C. 92, which authorizes national banks "located and doing business" in places of 5,000 or fewer inhabitants to act as the agent for "any fire, life or other insurance company," was repealed in 1918.

PARTIES TO THE PROCEEDINGS

The petitioner in No. 92-484 is the United States National Bank of Oregon. The petitioners in No. 92-507 are Stephen R. Steinbrink, Acting Comptroller of the Currency; the Office of the Comptroller of the Currency; and the United States.

The respondents in both cases are the Independent Insurance Agents of America, Inc.; the Independent Insurance Agents of Oregon; National Association of Casualty and Surety Agents; the National Association of Life Underwriters; the National Association of Professional Insurance Agents; the National Association of Surety and Bond Producers; the Oregon Association of Life Underwriters; and the Oregon Professional Insurance Agents, Inc.

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In the Supreme Court of the United States

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UNITED STATES NATIONAL BANK OF OREGON, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The statements filed with the order denying the suggestions for rehearing en banc (92-507 Pet. App.

34a-42a) are reported at 965 F.2d 1077. The opinion of the court of appeals (92-507 Pet. App. 1a-33a) is reported at 955 F.2d 731. The opinion of the district court (92-507 Pet. App. 43a-73a) is reported at 736 F. Supp 1162.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. A petition for rehearing was denied on May 22, 1992. 92-507 Pet. App. 34a. On August 7, 1992, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including September 19, 1992. The petition in No. 92-484 was filed on September 18, 1992, and the petition in No. 92-507 was filed on September 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 13 of the Federal Reserve Act of 1913, ch. 6, 38 Stat. 263; the Federal Reserve Act Amendments of 1916, ch. 461, 39 Stat. 752; and the War Finance Corporation Act of 1918, ch. 45, 40 Stat. 506, are reproduced at 92-507 Pet. App. 80a-94a.

STATEMENT

1. Petitioner United States National Bank of Oregon (the Bank) is a federally chartered bank headquartered in Portland. In 1984, the Bank applied to the Comptroller of the Currency to sell a full range of insurance through a wholly owned subsidiary located in the Bank's branch in Banks, Oregon, a town of 489 persons. The Comptroller, who is also a petitioner, approved the Bank's application. The Comptroller

relied on a provision of federal law formerly codified at 12 U.S.C. 92, which authorizes a national bank "located and doing business in any place the population of which does not exceed five thousand inhabitants" to act as an agent for "any fire, life or other insurance company."

The Comptroller noted that Section 92, as originally enacted, "impos[ed] * * * a geographic limitation in the statute with regard to [a national] bank's brokerage of real estate loans," but contained no such limitation with respect to the sale of insurance. 92-507 Pet. App. 77a. In addition, the Comptroller observed, the primary purpose underlying Section 92's enactment was to provide "additional income to banks in small towns that were having problems deriving a reasonable profit from their banking business." *Id.* at 78a. "[I]t is consistent with that purpose," the Comptroller stated, to permit national banks to sell insurance outside the small town where its selling office is located; indeed, "the market area for the general banking services of some small town banks may not be large enough to improve significantly the bank's profitability if its insurance sales are limited to that area." *Ibid.* The Comptroller therefore determined that, under Section 92, the Bank's subsidiary was authorized to sell a full range of insurance products to existing and potential customers in Oregon, as well as in those States in which the Bank's insurance subsidiary is authorized to do business. See 92-507 Pet. App. 79a.

Respondents—various trade associations representing insurance agents—challenged the Comptroller's decision in the United States District Court for the District of Columbia. The insurance agents argued

that the sale of insurance by national banks located in small towns should be limited to sales in those towns. Thus, in this case the insurance agents argued that Section 92 authorized the Bank's branch to sell insurance only in Banks, Oregon.

The district court disagreed and granted summary judgment for the defendants, finding that the Comptroller's interpretation of Section 92 was "rational and consistent with the statute." 92-507 Pet. App. 70a-71a. In the course of its opinion, the court noted that Section 92 no longer appears in the United States Code.[1] The district court assumed, however—on the basis of the fact that "Congress, other courts, and the Comptroller have presumed its continuing validity"—that the statute "exists *in proprio vigore*." 92-507 Pet. App. 44a-45a n.2.

2. A divided court of appeals reversed and remanded with instructions to enter judgment for the insurance agents, after concluding, sua sponte, that Section 92 had been repealed less than two years after its enactment by the War Finance Corporation Act of 1918. 92-507 Pet. App. 20a. The court acknowledged that the result it reached was not one that had been urged by any of the parties to the case. In fact, the court observed, when it asked for further briefing on the issue of Section 92's continued existence, the parties had "agreed that section 92 remains in effect." 92-507 Pet. App. 4a. Nevertheless, the court concluded,

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[1] Section 92 appeared in the editions of the United States Code issued in 1926, 1928, 1934, 1940, and 1946. It has not appeared in any subsequent edition of the United States Code. In its place, there is a notation by the codifiers that the provision was omitted in the 1918 amendment of Section 5202 of the Revised Statutes.

given that the underlying controversy revolved around the interpretation of a statute omitted from the United States Code, it had a duty to inquire into the statute's existence. *Id.* at 6a.

The court of appeals reviewed laws passed by Congress in 1913, 1916, and 1918. The 1913 Act was the Federal Reserve Act. As originally enacted in 1913, Section 13 of the Federal Reserve Act (which is *reprinted in* 92-507 Pet. App. 80a-82a as it was enacted in 1913) contained seven paragraphs under the title: "Powers Of Federal Reserve Banks." Ch. 6, § 13, 38 Stat. 263-264. The sixth of those paragraphs began by providing that "Section fifty-two hundred and two of the Revised Statutes of the United States"—a statute that dated back to 1863 and which listed certain liabilities that a national bank was permitted to incur in "an amount exceeding the amount of its capital stock"—"is hereby amended so as to read as follows." 92-507 Pet. App. 82a. That sixth paragraph amended Rev. Stat. § 5202 by listing an additional type of permissible national bank liability: "Fifth. Liabilities incurred under the provisions of the Federal Reserve Act." *Ibid.* The seventh and final paragraph of Section 13, as enacted in 1913, authorized the Federal Reserve Board to issue regulations governing the rediscount by federal reserve banks of certain bills receivable and bills of exchange. *Ibid.* The bill Congress passed in 1913 included no quotation marks. See *id.* at 80a-82a.

In 1916, Congress amended the Federal Reserve Act, including Section 13 of the Act. 39 Stat. 752-754. (The Federal Reserve Act Amendments of 1916, ch. 461, 39 Stat. 752, are *reprinted in* 92-507 Pet. App. 83a-93a.) Congress enacted Section 92 at that

time, by adding it to the end of the seven paragraphs contained in Section 13 of the Federal Reserve Act. See 92-507 Pet. App. 87a (first full paragraph).

Unlike the 1913 enactment, the 1916 statute employed quotation marks, and it was on those quotation marks that the court of appeals focused its attention. The 1916 amendments of Section 13 of the Federal Reserve Act commenced by providing "[t]hat section 13 be, and is hereby, amended to read as follows," followed by a colon and opening quotation marks. 92-507 Pet. App. 83a. The 1916 amendment went on to reprint each paragraph of Section 13 as it had been enacted in 1913, with certain substantive changes. In addition, each paragraph began with opening quotation marks, and no closing quotation marks appeared until the end of the sixth paragraph.

As in the 1913 Act, that sixth paragraph (92-507 Pet. App. 86a (first full paragraph)) immediately preceded the paragraph beginning "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows" (92-507 Pet. App. 86a (second full paragraph)). The paragraph involving Rev. Stat. § 5202 was reprinted in the 1916 amendments without any change in wording from 1913; however, opening quotation marks were added after that paragraph's introductory phrase. The next paragraph (92-507 Pet. App. 86a-87a), which provided (as in the 1913 version) for regulation by the Federal Reserve Board of certain transactions by federal reserve banks, was amended substantively in 1916; opening quotation marks were placed before that paragraph as well. The following paragraph (92-507 Pet. App. 87a (first full paragraph)), which was new in 1916 and was later codified at 12 U.S.C. 92, granted national banks

in small towns the power to act as agents for any "fire, life or other insurance company." That paragraph (henceforth "Section 92") also began with quotation marks. No closing quotation marks appeared until the end of the paragraph following Section 92 (92-507 Pet. App. 87a-88a), which was also added in 1916. The paragraph following those closing quotation marks (*id.* at 88a (first full paragraph)) amended Section 14 of the Federal Reserve Act.

Relying on the placement of the opening and closing quotation marks in the 1916 amendments, the court of appeals concluded that, "on its face, the 1916 amendments had the effect of placing section 92 within section 5202 of the Revised Statutes." 92-507 Pet. App. 9a. That is, the court concluded that Section 13 consisted of the six paragraphs from the words "[t]hat section thirteen be, and is hereby, amended so as to read as follows" to the first closing quotation marks. *Id.* at 83a-86a. The next four paragraphs, from "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows" to the provision amending Section 14 (92-507 Pet. App. 86a-88a) were part of Rev. Stat. § 5202, in the court's view. Section 92 was the third of the four paragraphs that the court concluded were placed in Rev. Stat. § 5202 by the 1916 amendments.

That conclusion proved crucial, for in 1918 Congress amended Rev. Stat. § 5202 in the course of enacting the War Finance Corporation Act. See ch. 45, § 20, 40 Stat. 512, *reprinted in* 92-507 Pet. App. 94a. The 1918 amendment specified that Rev. Stat. § 5202 "is hereby amended so as to read as follows," then listed the five existing types of liabilities national banks had been authorized to incur in excess

of their capital stock, and added: "Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act." 92-507 Pet. App. 94a. The 1918 amendment did not, however, restate any of the three paragraphs that in 1916 had followed the paragraph beginning "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows." Because the War Finance Corporation Act did not set out those three paragraphs (which included Section 92), the court of appeals concluded that they had been repealed in 1918. 92-507 Pet. App. 9a-10a.

The court characterized the parties' contrary analysis of the 1916 amendments—that Section 92 was part of Section 13 of the Federal Reserve Act—as "plausible" and acknowledged that "the placement of section 92 in section 5202 of the Revised Statutes [by the 1916 Act] might well have been a mistake." 92-507 Pet. App. 19a. As the court observed, Section 92 and its companion paragraphs were "textually unrelated" to the listing of the permissible types of excess national bank liabilities contained in Section 5202. 92-507 Pet. App. 11a. Moreover, the court noted, when Congress had itself examined the question in 1958, "an impressive array of witnesses" had concluded that Congress did not intend to place Section 92 in Section 5202 of the Revised Statutes, and that Section 92 had therefore never been repealed. 92-507 Pet. App. 11a.

The court ultimately dismissed the intentions of the 1916 Congress as "essentially irrelevant," on the ground that it was the actions of the 1918 Congress that mattered. 92-507 Pet. App. 12a. The court found it "fair to assume" that members of the 1918 Congress "would have sought out a current text of

section 5202 to work from, and not relied on institutional memories of what the text was, or should have been." *Ibid.* Since in 1916 two "privately published services" placed Section 92 in Section 5202 of the Revised Statutes (see 9 U.S. Comp. Stat. Ann. § 9764 (West 1916); 3 U.S. Stat. Ann. § 5202 (T.H. Flood & Co. 1916)), and the quotation marks in the 1916 Act supported that conclusion, the court "assume[d] that the 65th Congress understood section 92 to be part of section 5202, and that its exclusion from the amended section 5202 signaled its repeal." 92-507 Pet. App. 13a. The court reached that conclusion despite the fact that, as the court conceded, the purpose of the 1918 War Finance Corporation Act—"to assist the financing of the war effort"—"had no logical relationship to the insurance activities of small town banks." *Ibid.*

The court gave no weight to Section 92's subsequent treatment by Congress and the administrative agencies charged with administering the federal banking laws. The court acknowledged that Congress in 1982 had purported to amend Section 92, and that the Comptroller has continued to treat Section 92 as valid law, but dismissed their views as "irrelevant" and "immaterial" to the issue of whether Congress had in fact repealed Section 92 in 1918. 92-507 Pet. App. 15a. Similarly, the court dismissed the various judicial decisions since Section 92's omission from the Code that have relied upon Section 92—including *Commissioner* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394 (1972)—on the ground that in each of those cases the court "presumed" that Section 92 remains valid. 92-507 Pet. App. 16a.

The court also eschewed the power to "rectify Congress's apparent error." 92-507 Pet. App. 14a. It

distinguished numerous cases in which courts had disregarded erroneous statutory punctuation on the ground that each involved an error that "distorted the meaning of a statute," but did not lead to repeal of the statute. *Ibid.*

Judge Silberman, dissenting, would have upheld the Comptroller's decision as embodying a reasonable interpretation of Section 92, without reaching the question whether the provision remains good law. Conceding that his position "might be thought counterintuitive" (92-507 Pet. App. 27a), Judge Silberman believed that the court had no duty to reach the issue of the statute's existence, which appellants had "carefully, deliberately and thoughtfully waived." *Id.* at 31a.

3. The Comptroller and the Bank filed timely petitions for rehearing with suggestions for rehearing en banc, which were denied. Judge Silberman (this time joined by two colleagues) again dissented on the ground that the panel should not have decided whether Section 92 had been repealed. 92-507 Pet. App. 38a. In addition, Judge Silberman observed that the government had made "a forceful argument that the panel * * * decided the matter incorrectly." *Id.* at 40a. He added that "the panel's opinion * * * created legal uncertainty concerning the sale of insurance by banks located and doing business in small towns (which has been the settled practice for most of this century)." *Id.* at 40a-41a.[2]

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[2] Judge Sentelle, joined by the panel majority, filed a statement concurring in the denial of rehearing en banc. 92-507 Pet. App. 35a-37a. Judge Randolph filed a separate statement expressing his view that "denials of rehearing en banc are best followed by silence." *Id.* at 42a.

SUMMARY OF ARGUMENT

The court of appeals suggested no reason why Congress in 1918 might have wanted to repeal Section 92, which it had enacted just 19 months before. Instead, the court was content to consider the matter a "mistake" (92-507 Pet. App. 20a) resulting from the placement of the quotation marks in the 1916 Act. But the court's conclusion ignores the language, structure, and substance of the 1916 Act. Where the language of a statute admits of no other meaning, a court may be obliged to give effect to a provision that does not embody Congress's intent. But respect for the legislative process requires a court to do more than conclude that Congress blindly erred where, as we show here, there is another reasonable interpretation.

A. The quotation marks in the 1916 Act support the court of appeals' decision only when considered in isolation. The language of the 1916 Act suggests that Section 92 was never placed in Rev. Stat. § 5202, and therefore was not affected when Rev. Stat. § 5202 was amended in 1918. More specifically, in 1916 Congress used the phrase "this Act" to refer to "the Federal Reserve Act" in those provisions that were to be part of the Federal Reserve Act. On the other hand, it referred to the Federal Reserve Act by its full name if the provision was to be codified elsewhere. The paragraph beginning "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows" (92-507 Pet. App. 86a (second full paragraph)) accordingly used the full name of the Federal Reserve Act. The paragraph immediately preceding Section 92, in contrast, referred to the Federal Reserve Act as "this Act," showing that it was part of the Federal Reserve

Act. If the paragraph preceding Section 92 was part of the Federal Reserve Act, then so was Section 92.

That structure is supported by the fact that the title of the 1916 Act did not state that the Act was amending a provision of the Revised Statutes, even though the practice of the day was to make such a specification if an amendment to the Revised Statutes was contained in the body of the statute. In addition, it would have been inconsistent with the substance of Rev. Stat. § 5202, which for more than fifty years had dealt with limits on national bank indebtedness, for Congress to have codified Section 92 and the paragraphs preceding and following it in Rev. Stat. § 5202, since those three paragraphs had nothing to do with limits on national bank indebtedness. Those three paragraphs fit into the Federal Reserve Act, however, which is where Congress intended to place them.

B. As a general matter, it is a mistake to exalt punctuation over the language, structure, and substance of a statute. In this case, moreover, there is affirmative evidence that Section 92's drafters did not intend the quotation marks to have any interpretive significance—the Senate voted to delete the confusing marks. 53 Cong. Rec. 11,155 (1916).

C. The conclusion that Section 92 was never placed in Rev. Stat. § 5202 explains why there is no indication in the language or the legislative history of the 1918 Act that Congress thought that it was repealing Section 92. Moreover, there is no reason why Congress would have wanted to repeal the three paragraphs it had enacted 19 months earlier. Such considerations led the Second Circuit to hold, after the decision in this case, that Section 92 remains good law. *American Land Title Ass'n* v. *Clarke*, 968 F.2d

150, 154 (2d Cir. 1992), petitions for cert. pending, Nos. 92-482 and 92-645.

D. Contrary to the court of appeals' suggestion, it is unlikely that the 1918 Congress understood Section 92 to be in Rev. Stat. § 5202 simply because two private compilations placed the provision there. As we have stated, the text of the 1916 Act as reprinted in the Statutes at Large suggested a different structure. In any event, the most easily accessible compilation of the banking laws in 1918 was that published by the Senate Committee on Banking and Currency, which showed Section 92 as part of Rev. Stat. § 5202 *and* as part of Section 13 of the Federal Reserve Act. S. Doc. No. 412, 64th Cong., 1st Sess. 83-84 (1917) (Rev. Stat. § 5202); S. Doc. No. 412, *supra*, at 136-137 (Section 13). On the basis of the Senate compilation—the compilation to which the Congress most likely would have turned—the drafters of the 1918 Act would have concluded that Section 92 would remain in force no matter how Rev. Stat. § 5202 was amended.

E. Congress, the courts, and the agencies charged with the administration of the banking laws have consistently acted on the assumption that Section 92 remains good law. See, *e.g.*, Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(b), 96 Stat. 1469, 1510-1511; *Commissioner* v. *First Security Bank of Utah, N.A.*, 405 U.S. 394, 400-401 (1972); *Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7026 Before the House Comm. on Banking and Currency*, 85th Cong., 2d Sess. 1036-1040 (1958) (statement of Comptroller and Federal Reserve Board memorandum). Moreover, the contemporaneous view of Congress and the agencies administering the federal banking laws—the best available guide to what Congress intended—was that

Section 92 remained in effect after 1918. See S. Doc. No. 216, 66th Cong., 2d Sess. 146 (1920); Federal Res. Bd., *The Federal Reserve Act As Amended* 30 (1919).

ARGUMENT

SECTION 92 WAS NOT REPEALED IN 1918

A. The Language, Structure, And Substance Of The 1916 Act Show That Section 92 Was Not Placed In Rev. Stat. § 5202.

The court of appeals' error lies in its reliance on the placement of the quotation marks in the 1916 Act to the exclusion of analysis of the text, structure, and substance of the Act, all of which demonstrate that Section 92 was never placed in Rev. Stat. § 5202 in 1916. As a result, Section 92 was not affected at all—much less repealed—when Rev. Stat. § 5202 was amended in 1918.[3]

1. The opening and closing quotation marks, considered in isolation, suggest that in 1916 Section 92

[3] The Bank has raised the question whether the court of appeals should have addressed the issue of Section 92's existence when the parties to the proceeding agreed that Section 92 remained good law. We did not present this as a question in our petition for a writ of certiorari in this case, and do not urge it as a ground for reversal here. Although the court of appeals may have had the *discretion* to refuse to determine the issue of Section 92's existence (see *Carducci* v. *Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)), we cannot say that it was powerless to resolve the question if it chose to do so (see *Arcadia, Ohio* v. *Ohio Power Co.*, 111 S. Ct. 415, 418, 422 (1990), and *United States* v. *Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring)). Indeed, had the text of the law shown that Section 92 actually had been repealed in 1918, it would have been entirely proper for the court to decline to construe it. Moreover, at this point we think the Court should provide a definitive answer as to whether Section 92 was repealed.

and its companion paragraphs (that is, the paragraphs preceding and following Section 92) were to be placed in Rev. Stat. § 5202. However, the language of the 1916 Act suggests differently. The paragraph preceding Section 92 in the 1916 Act grants the Federal Reserve Board authority to regulate the "discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized *by this Act*." 92-507 Pet. App. 86a-87a (emphasis added). The reference to "this Act" must mean the Federal Reserve Act, not Rev. Stat. § 5202, since the discount and rediscount authority was granted by the second and third paragraphs of Section 13 of the Federal Reserve Act, and not by Rev. Stat. § 5202. See 92-507 Pet. App. 84a-85a. Thus, the use of the term "this Act" in the paragraph preceding Section 92 suggests that, despite the use of quotation marks, the preceding paragraph was not placed in Rev. Stat. § 5202.

The conclusion that the paragraph preceding Section 92 was part of Section 13 of the Federal Reserve Act, and not part of Rev. Stat. § 5202, is strengthened by the fact that that paragraph was indisputably part of Section 13 of the Federal Reserve Act as enacted in 1913, since the 1913 Act contained no quotation marks. See 92-507 Pet. App. 80a-82a. In addition, no one has suggested any reason that Congress would have felt it necessary or appropriate in 1916 to transfer the paragraph preceding Section 92 —a provision granting the Federal Reserve Board authority to regulate certain practices of federal reserve banks—from the Federal Reserve Act to a section of federal law dealing with the indebtedness of national banks. To the contrary, a provision dealing

with regulation of federal reserve banks by the Federal Reserve Board would seem to belong in the Federal Reserve Act. Moreover, as enacted in 1913, the paragraph that preceded Section 92 in 1916 also referred to "this Act" (see *id.* at 82a), as it did in 1916. In our view, it is clear that "this Act" referred to the Federal Reserve Act both in 1913 and in 1916.

By referring to "this Act," the paragraph preceding Section 92 follows the same usage as other paragraphs in the 1916 Act, which also refer to "this Act" in a manner that can only mean "the Federal Reserve Act." For example, the 1916 Act added a new subsection (Section 11(m)) to the Federal Reserve Act, which authorized the Federal Reserve Board to permit member banks to deposit all or part of the reserves "now required by section nineteen of *this Act* to be held in their own vaults" in federal reserve banks. 92-507 Pet. App. 83a (emphasis added). Because the 1916 Act was not divided into numbered sections, the reference to "section nineteen of this Act" can only be to Section 19 of the Federal Reserve Act, which set forth detailed requirements according to which member banks were to hold a certain percentage of their reserves in their own vaults. See 38 Stat. 270-271. (Section 19 was not amended at all in 1916.) The same usage was employed in the provision in the 1916 Act amending the second paragraph of Section 16 of the Federal Reserve Act. See 92-507 Pet. App. 89a (referring to "section thirteen of this Act" and "section 14 of this Act").

The text of the paragraph beginning "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows" also supports the conclusion that it was only that paragraph that related to Rev. Stat. § 5202,

because that paragraph refers to the "Federal reserve Act," rather than "this Act." See 92-507 Pet. App. 86a (line beginning "Fifth"). The reference in that paragraph to the Federal Reserve Act by its full title is not surprising, since a reader of Rev. Stat. § 5202 would otherwise have no way of knowing to which Act the provision referred. The usage makes the inference to be drawn from the term "this Act" in the paragraph preceding Section 92 even stronger, since it suggests that Congress in 1916 distinguished between statutory provisions that were not to be placed in the Federal Reserve Act (and thus would have to refer to that Act by its full title) and provisions that remained part of the Federal Reserve Act, which could intelligibly refer to the Federal Reserve Act as "this Act."[4]

In short, since the text of the paragraph preceding Section 92 uses the term "this Act" to refer to the Federal Reserve Act, that paragraph was not placed in Rev. Stat. § 5202. And if the paragraph preceding Section 92 was not placed in Rev. Stat. § 5202, then there is no reason to think that any of the paragraphs that followed it, including the paragraph later codified as Section 92, were placed in Section 5202. That is, no reading of the quotation marks permits the conclusion that the paragraph preceding Section

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[4] The use of the term 'this Act" in the paragraph preceding Section 92 is plainly not an antecedent reference to the term "Federal reserve Act," contrary to the suggestion of the insurance agents. Br. in Opp. 14. The term "this Act" was used twice in the 1916 amendments before the phrase "Federal reserve Act" appears. See 92-507 Pet. App. 83a (paragraph beginning "'(m)"), 84a (first full paragraph). There was no antecedent reference in either of those instances, and there is no good reason to think that "this Act," as similarly used in the paragraph preceding Section 92, referred back to "Federal reserve Act" in the paragraph containing Rev. Stat. § 5202.

92 was placed in the Federal Reserve Act, but Section 92 was placed in Rev. Stat. § 5202.

2. The title of the 1916 Act, which "can aid in resolving an ambiguity in the legislation's text" (*INS* v. *National Center for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 556 (1991) (citations omitted)), also is inconsistent with the conclusion that the 1916 Act amended Rev. Stat. § 5202. That title, "An Act To amend certain sections of the Act entitled 'Federal reserve Act,' approved December twenty-third, nineteen hundred and thirteen," nowhere suggests that the statute was adding matter to Rev. Stat. § 5202. (And, in fact, none of the words in the paragraph involving Rev. Stat. § 5202 differ from the words in that provision as it was amended in 1913. Compare 92-507 Pet. App. 82a with *id.* at 86a.) By contrast, the titles of other statutes passed during the same period demonstrate that when Congress intended to amend a section of the Revised Statutes as well as a provision of the Federal Reserve Act, that intent was reflected in the title. See ch. 177, 40 Stat. 967 (1918) ("An act to amend and reenact sections four, eleven, sixteen, nineteen, and twenty-two of the Act approved December twenty-third, nineteen hundred and thirteen and known as the Federal reserve Act, and sections fifty-two hundred and eight and fifty-two hundred and nine, Revised Statutes."); ch. 101, 40 Stat. 1314 (1919) ("An act To amend sections seven, ten, and eleven of the Federal reserve Act, and section fifty-one hundred and seventy-two, Revised Statutes of the United States."). The absence of any similar indication in the title of the 1916 Act supports the conclusion that the 1916 Act did not add Section 92 and its

companion paragraphs to Rev. Stat. § 5202, but simply restated Rev. Stat. § 5202 without change.[5]

3. The substance of the 1916 amendments also indicates that Section 92 was not placed in Rev. Stat. § 5202. Section 5202, originally enacted as part of the National Bank Act, had always dealt with limits on the indebtedness of national banks.[6] By contrast, Section 92 dealt with insurance agency and real estate brokerage powers of national banks and has nothing to do with limits on indebtedness. The subject matter of the paragraphs on either side of Section 92 is similarly remote from the subject matter of Rev. Stat. § 5202. As noted, the paragraph

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[5] The paragraph in the 1916 Act relating to Rev. Stat. § 5202 begins by stating "Section fifty-two hundred and two of the Revised Statutes of the United States *is hereby amended* so as to read as follows" (92-507 Pet. App. 86a) (emphasis added)), but that is exactly how it read in 1913 (see *id.* at 82a). Thus, the substantive amendment to Rev. Stat. § 5202 (the addition of the provision stating "[f]ifth," that "[l]iabilities incurred under the provisions of the Federal Reserve Act" may be incurred in excess of the value of the bank's capital stock) occurred in 1913. Congress did not intend to amend Rev. Stat. § 5202 in 1916; it simply reprinted it, along with the rest of Section 13 of the Federal Reserve Act as enacted in 1913, with the amendments made in 1916.

[6] Rev. Stat. § 5202 was based on Section 36 of the National Bank Act of 1864 (Act of June 3, 1864) ch. 106, § 36, 13 Stat. 99, 110, which in turn reenacted with minor changes Section 42 of the National Bank Act of 1863(Act of Feb. 25, 1863) ch. 58, § 42, 12 Stat. 665, 677. Rev. Stat. § 5202 originally contained four listed exclusions from the limits on national bank indebtedness. The fifth exclusion was added when Rev. Stat. § 5202 was amended by Section 13 of the Federal Reserve Act in 1913 (see 92-507 Pet. App. 82a), and a sixth was added by Section 20 of the War Finance Corporation Act of 1918 (40 Stat. 512) (see 92-507 Pet. App. 94a).

preceding Section 92 concerns the Federal Reserve's power to issue regulations regarding certain practices of federal reserve banks. The paragraph following Section 92 deals with foreign acceptances by federal reserve and member banks. There is no reason that Congress would have placed those provisions in Rev. Stat. § 5202 rather than in the Federal Reserve Act.

B. The 1916 Act's Quotation Marks Are Of No Interpretive Significance.

As a general matter, quotation marks should not override the structure of the statute's text. As this Court long ago recognized, "[p]unctuation is a most fallible standard by which to interpret a writing." *Ewing* v. *Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837). See also *Erie R. R.* v. *United States*, 240 F. 28, 32 (6th Cir. 1917) ("The presence or absence of a comma, according to the whim of the printer or proof reader, is so nearly fortuitous that it is a wholly unsafe aid to statutory interpretation.").[7] In this case, moreover, there is strong evidence that Congress did not intend the quotation marks in the 1916 Act to have any interpretive effect. Indeed, it is apparent that the statute's drafters did not intend to employ quotation marks at all.

[7] The D.C. Circuit recognized that a number of decisions of this Court have stated that punctuation errors may be rectified to avoid distortion of a statute. 92-507 Pet. App. 14a. But it said that this case differs from those cases because "the putative error brings about the repeal of a statute." *Ibid.* This distinction—that courts may correct punctuation errors to avoid what may be relatively small mistakes (such as accidental changes in meaning), but may not correct punctuation errors to avoid big mistakes (such as accidental repeal)—is unconvincing. It seems especially unpersuasive where, as here, if the erroneous punctuation is not corrected, the text of the statute must be ignored.

The committee bill, which contained Section 92's companion paragraphs but not Section 92 (which was added by amendment), used quotation marks. But the quotation marks in the committee bill clearly placed the paragraph preceding Section 92 in Section 13 of the Federal Reserve Act.[8] Section 92 was added by floor amendment before the quotation marks were changed, so it is clear that Section 92 was not part of Rev. Stat. § 5202 at the time it was adopted. After Section 92 was added to the bill, Senator Brandegee drew attention to the committee's use of quotation marks. He asked Senator Owen, "Inasmuch as this bill provides that certain sections of the Federal reserve act are to be amended 'to read as follows,'" whether he thought that "the amended sections ought to be left in quotation marks, so that they will appear in that way in the Federal reserve act?" 53 Cong. Rec. 11,155 (1916). Owen agreed that although quotation marks had been used in the committee report, he "did not think they should be used"; instead, he thought that they "should be omitted." *Ibid.* Brandegee thereupon suggested "that in the reprint to be made of the bill the quotation marks be omitted," to which Owen replied: "I accept that amendment." *Ibid.* The amendment was then adopted by the Senate without objection. *Ibid.*

[8] In the committee bill, opening quotation marks appeared after the provision stating that Section 13 was "amended to read as follows," and closing quotation marks did not appear until after the provision that ultimately preceded Section 92. H.R. Rep. No. 481, 64th Cong., 1st Sess. 1-3 (1916); 53 Cong. Rec. 10,998 (1916). The final paragraph of Section 13 in the committee bill, which followed Section 92 after it was added, was printed in italics in the committee bill because it was entirely new; that final paragraph had no quotation marks at all. H.R. Rep. No. 481, at 3.

It is difficult to know precisely at what point, and by whom, the new quotation marks were inserted.[9] What is clear is that the Act's drafters did not intend for the marks to have any significance in interpreting the statute, since the drafters had instructed that the marks be removed. Thus, apart from the difficulties associated with interpretive reliance on punctuation in general, there is no reason in this case to conclude that the marks should control over the evidence in the text of the 1916 Act that Section 92 was not placed in Rev. Stat. § 5202.[10]

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[9] Materials obtained from the National Archives indicate that before publication in the Congressional Record, the Senate Conference Report did not contain any quotation marks, and although the House Conference Report had such marks inserted by hand, they did not conform to the marks as they appear in the enrolled Act. See Exhibit to Brief of Amici Curiae American Bankers Ass'n in Support of Petitioners. The Senate and House Conference Reports, as they were printed in the Congressional Record, *do* contain the quotation marks as they appear in the Statutes at Large. 53 Cong. Rec. 13,069 (1916) (Senate Conf. Rep.); *id.* at 13,354 (House Conf. Rep.). The enrolled Act, which has been examined in the National Archives, also contains the quotation marks as they appear in the Statutes at Large.

[10] Indeed, the quotation marks at issue in this case appear to be of considerably less significance than most punctuation. That is, while punctuation generally is of less significance than text, punctuation is usually embedded in text, and frequently serves to give meaning to the text. The quotation marks at issue here are wholly extraneous to the meaning of the text; they are more in the nature of marginal printer's notes, such as directions about spacing and indentation. The fact that they were viewed as being of little significance is shown by the fact that some unknown person inserted them while the Act was being printed. See note 9, *supra*.

C. There Is No Indication That Congress Intended To Repeal Section 92 In 1918, Nor Any Reason Why It Should Have.

The conclusion that Congress in 1916 did not place Section 92 and its companion provisions in Rev. Stat. § 5202—and thus that Section 92 was unaffected by the 1918 amendments—also satisfactorily explains the otherwise extraordinary silence in the legislative history of the 1918 War Finance Corporation Act, which contains not a word about repealing the recently enacted national bank and federal reserve powers.

The 1918 Act established a "War Finance Corporation" authorized, among other things, to advance funds to "any bank * * * in the United States" which had outstanding loans to persons or businesses "whose operations shall be necessary or contributory to the prosecution of the war." Ch. 45, § 7, 40 Stat. 508. To further the operations of the War Finance Corporation, Section 20 of the 1918 Act amended Rev. Stat. § 5202 to provide for another type of indebtedness that a national bank could assume in excess of the amount of its capital stock: "Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act." 92-507 Pet. App. 94a. As Representative Kitchin explained, "[i]f we do not put in this provision, and make the change in the law which this amendment makes, it will tie the hands of the national banks from helping out these corporations." 56 Cong. Rec. 3804 (1918).

Nothing in the legislative history of the 1918 Act suggests even indirectly that the Act was intended to affect (much less repeal) Section 92 and its companion paragraphs. As the Second Circuit has

observed—in concluding that Section 92 remains good law—"if it actually was Congress' intent to effect such a permanent change to an unrelated area of law, we would expect some clue to this intent to appear somewhere in the legislative history." *American Land Title Ass'n* v. *Clarke*, 968 F.2d at 154.[11]

The lack of any indication in the legislative history of the 1918 Act that any member of Congress thought that Section 92 and its companion paragraphs were being repealed is particularly significant given that Senator Owen, Section 92's principal sponsor, remained Chairman of the Senate Banking Committee in 1918. Moreover, although Senator Owen commented on other matters concerning the 1918 Act, during the initial Senate debates, see 56 Cong. Rec. 2793, 2799-2801, 2848-2850, 2852-2855, 2858, 2860-2861, 2919-2924, 2926-2927, 3040-3408, 3090, 3107-3109, 3131-3133, 3135-3136, 3138-3144, 3151 (1918), and after the bill was returned to the Senate from conference with Section 20 added, 56 Cong. Rec. 4379 (1918), he made no comment that suggested that there was a move afoot to repeal Section 92. In addition, Comptroller Williams was still in office in 1918. 2 *Annual Rep. of the Comptroller of the Currency* (Dec. 2, 1918), H.R. Doc. No. 1453, 65th Cong., 3d Sess. 15 (1919). He, too, presumably would also have commented on any change that would have repealed a provision that he had successfully submitted less than two years before, particularly a provision contained in a Treasury Department-proposed measure, as the 1918 Act was.[12]

Other aspects of the 1918 Act also suggest that it was not intended to repeal Section 92. In the first place, it would be "wholly incongruous," as the Second Circuit observed, "for Congress to repeal a provision regarding the totally unrelated matter of insurance agency powers in an emergency measure directed at winning the war." *American Land Title*, 968 F.2d at 154. It is also "highly unlikely" that the legislature's intent to encourage national banks to support the operations of the War Finance Corporation "would just happen to coincide with an intent to repeal provisions regarding national banks' insurance agency powers." *Ibid.*

Furthermore, there is no reason to suspect that the grounds upon which Congress had relied in passing Section 92 had significantly changed between the 1916 Act's enactment in September of that year and April 1918, when the War Finance Corporation Act was passed. As Comptroller Williams stated in proposing Section 92, the provision was intended to enlarge the powers of small national banks in order "to provide

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[11] It is the Comptroller's position, supported, *inter alia*, by *Independent Bankers Ass'n of Am.*, v. *Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980), that Section 92 does not constitute a limitation on activities (such as the sale of title insurance) that fall within the incidental powers of national banks. Accordingly, we disagree with the Second Circuit's ultimate conclusion in *American Land Title* —that Section 92 impliedly bars national banks from selling title insurance—but not its conclusion that Section 92 remains good law. The government has filed a petition for a writ of certiorari seeking review of the Second Circuit's decision, which remains pending. *Steinbrink* v. *American Land Title Ass'n*, No. 92-645. See also *The Chase Manhattan Bank, N.A.* v. *American Land Title Ass'n*, No. 92-482.

[12] Indeed, Comptroller Williams submitted an annual report to Congress in 1918 in which the War Finance Corporation Act is described, but no mention is made of Section 92. 1 *Annual Report, supra*, at 79, 171.

them with additional sources of revenue" so that they might be able to "better compete" with state banks and trust companies "authorized * * * to do a class of business not strictly that of commercial banking." 53 Cong. Rec. 11,001 (1916) (letter from Comptroller Williams to Senator Owen). Comptroller Williams explained that there were many banks "located in country communities" that, given their limited deposit base, had difficulty generating "a satisfactory return to shareholders," which led to pressure to charge "excessive and in some cases grossly usurious [interest] rates." *Ibid.*[13] It was his hope that the additional income to be derived from their Section 92 powers would "strengthen" the smaller national banks "and increase their ability to make a fair return to their shareholders." *Ibid.*

There is nothing to suggest that the pressures on small banks to "yield a satisfactory return to shareholders" (*ibid.*) decreased dramatically in the 19 months between the passage of the 1916 and 1918 Acts. If anything, the temptation to charge excessive interest would have grown as the United States became involved in World War I. In any event, the problem Comptroller Williams described resulted from the structure of small town banking, and that problem existed whatever the economic conditions prevailing at any particular time. In the end, no one has been able to put forth any reason why Congress in 1918 would have wanted to repeal the national bank insurance

[13] Williams noted in his letter that in 1916 there were more than 2,000 national banks with a minimum capital stock of $25,000 located in towns or villages of 3,000 or fewer inhabitants. 53 Cong. Rec. 11,001 (1916).

agency powers it had taken the trouble to enact in 1916.[14]

D. There Is No Reason To Credit Section 92's Treatment By Two Privately Published Statutory Compilations.

The D.C. Circuit acknowledged that deleting Section 92 was "unrelated" to the 1918 Act's war financing goals, but assumed that the 1918 Congress understood Section 92 to be part of Rev. Stat. § 5202 because of the "facially unambiguous language" of the 1916 Act and the fact that two "privately published services" placed Section 92 in Rev. Stat. § 5202. 92-507 Pet. App. 13a (citing 9 U.S. Comp. Stat. Ann. § 9764 (West 1916); 3 U.S. Stat. Ann. § 5202 (T.H. Flood & Co. 1916)). However, as shown above, the 1916 Act does not unambiguously show Section 92 to be part of Rev. Stat. § 5202. Indeed, insofar as resort is made to the text of the Act rather than its punctuation, the Act placed Section 92 in Section 13 of the Federal Reserve Act. And it should be beyond dispute that the views of the editors of privately published services are not controlling.

While it is "fair to assume" (as did the D.C. Circuit) that, while drafting the 1918 Act, interested members of Congress "would have sought out a current text of section 5202 to work from, and not

[14] A similar point can be made about the paragraph preceding Section 92 (providing for regulation by the Federal Reserve Board of certain practices of federal reserve banks) and the paragraph following Section 92 (providing for the acceptance of certain bills of exchange). There is no explanation as to why those provisions, which were added in 1913 and 1916, would have been repealed in 1918. And neither of those provisions related to the subject matter of the War Finance Corporation Act of 1918.

relied on institutional memories" (92-507 Pet. App. 12a), it is unlikely that the drafters would have turned to privately published services. The most easily accessible compilation of the Federal Reserve and National Bank Acts would have been that prepared by the Comptroller and published by the Senate Committee on Banking and Currency. Indeed, if Congress did not use the compilation it published, it is not clear why it would have bothered to publish the compilation. Significantly, the Senate compilation showed Section 92 and its companion provisions as part of Rev. Stat. § 5202 *and* as part of Section 13 of the Federal Reserve Act. S. Doc. No. 412, 64th Cong., 1st Sess. 83-84 (1917) (Rev. Stat. § 5202); S. Doc. No. 412, *supra*, at 136-137 (Section 13).[15] Thus, the drafters of the 1918 Act would have assumed on the basis of the Senate compilation that Section 92 would continue in existence however Rev. Stat. § 5202 was amended. Indeed, the Senate Committee and Federal Reserve Board compilations published *after* the 1918 Act was enacted continued to show Section 92 as part of Section 13 of the Federal Reserve Act. S. Doc. No. 216, 66th Cong., 2d Sess. 146 (1920); Federal Res. Bd., *The Federal Reserve Act As Amended* 30 (1919). Thus, both Congress and the agencies charged with administering the federal banking laws believed—and had a reasonable basis for believing—that Section 92 remained in effect after the enactment of the War Finance Corporation Act of 1918.

[15] A compilation of the Federal Reserve Act prepared by the Federal Reserve Board in 1917 also placed Section 92 and its companions in Section 13 of the Federal Reserve Act, although it reproduced the confusing punctuation of the Statutes at Large. Federal Res. Bd., *The Federal Reserve Act As Amended* 27-28 (1917).

E. Section 92's Existence Has Been The Basis For Congressional, Judicial, And Administrative Actions For 75 Years

Finally, the subsequent actions of Congress, the courts, and the Comptroller are utterly inconsistent with the conclusion that Section 92 has been repealed.

After holding hearings in 1958 which aired the issue of Section 92's existence,[16] Congress has twice in recent years enacted legislation which has assumed Section 92's existence. Indeed, in the Garn-St Germain Depository Institutions Act of 1982, Congress amended "[t]he Act of September 7, 1916 (12 U.S.C. 92; 39 Stat. 753)" by striking out the section concerning real estate brokerage authority. See Pub. L. No. 97-320, § 403(b), 96 Stat. 1469, 1510-1511. Plainly, there would have been no reason to amend Section 92 in 1982 if the statute had been repealed in 1918. Similarly, in the Competitive Equality Banking Act of 1987, Congress imposed a one-year moratorium on the expansion of national bank insurance agency activities "pursuant to the Act of September 7, 1916 (12 U.S.C. 92)." See Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 552, 583. Again, there was no reason for Congress to have imposed a moratorium on the expansion of Section 92 activities if it no longer remained good law.

In addition, until the decision in this case, every court that had discussed Section 92—including this Court—had assumed its continued existence. See *Commissioner* v. *First Security Bank of Utah, N.A.*, 405

[16] See *Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7026 Before the House Comm. on Banking and Currency*, 85th Cong., 2d Sess. (1958).

U.S. 394, 401-402 (1972); *Independent Ins. Agents of Am., Inc.* v. *Board of Governors*, 835 F.2d 1452, 1456 n.8 (D.C. Cir. 1987); *Independent Bankers Ass'n of Am.* v. *Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980); *First National Bank of Lamarque* v. *Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir. 1980); *Saxon* v. *Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968); *Commissioner* v. *Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966); *Genessee Trustee Corp.* v. *Smith*, 102 F.2d 125, 127 (6th Cir. 1939); *Thompson* v. *Kerr*, 555 F. Supp. 1090, 1096, 1098 (S.D. Ohio 1982); *Guaranty Mortgage Co.* v. *Z.I.D. Assocs., Inc.*, 506 F. Supp. 101, 104-105 (S.D.N.Y. 1980); *Washington Agency* v. *Forbes*, 16 N.W.2d 121, 121-122 (Mich. 1944); *Marshall National Bank & Trust Co.* v. *Corder*, 194 S.E. 734, 736 (Va. 1938); *Greene* v. *First National Bank of Thief River Falls*, 215 N.W. 213, 213 (Minn. 1927). Indeed, because of the wealth of authority assuming Section 92's existence, the Fifth Circuit stated in *First National Bank of Lamarque* that "further discussion of the issue seems moot." 610 F.2d at 1262 n.6 (5th Cir. 1980). See also *American Land Title Ass'n* v. *Clarke*, 968 F.2d 150, 154 (2d Cir. 1992), petitions for cert. pending, Nos. 92-482 and 92-645 (holding, after the decision in this case, that Section 92 has not been repealed); *Owensboro National Bank* v. *Moore*, 803 F. Supp. 24, 33 (E.D. Ky. 1992) (same).

In *First Security*, for example, this Court overturned a determination by the Commissioner of Internal Revenue which sought to allocate to certain banks income derived from the sale of insurance policies received by affiliates. On the basis of the assumption that Section 92 bars such banks "from receiving insurance-related income" (405 U.S. at 402), the Court concluded that "fairness requires the tax to fall on the party that actually receives the premiums rather than on the party that cannot" (*id.* at 405). See also *id.* at 414 n.1 (Marshall, J., dissenting) (describing Section 92 as "the dispositive factor" in the Court's analysis); *id.* at 419 (Blackmun, J., dissenting) (noting "the Court's repetitive emphasis on the missing § 92").

Lastly, the Comptroller, who is charged with implementing and interpreting Section 92, as well as the Federal Reserve Board, which generally has authority to enforce the Federal Reserve Act, have consistently taken the position that Section 92 was not enacted as part of Rev. Stat. § 5202 and was not repealed in 1918. See, *e.g.*, S. Doc. No. 216, 66th Cong., 2d Sess. 146 (1920) (compilation prepared under the Comptroller's direction); Federal Res. Bd., *The Federal Reserve Act As Amended* 30 (1919). *1958 Hearings, supra*, at 1036 (letter from Comptroller Gidney to House Banking Chairman Spence); *id.* at 1036-1040 (memorandum prepared by Federal Reserve Board); Federal Res. Bd., *Federal Reserve Act and Other Statutory Provisions Affecting the Federal Reserve System* ¶ 1-121 (1990).

While we readily agree that such subsequent treatment cannot revive a statute whose text clearly indicates its repeal, the texts of the relevant statutes in this case, fairly read, do not support the conclusion that Section 92 was repealed. At the least, there is ambiguity. The best guide to the proper resolution of that ambiguity, in our view, is the contemporaneous construction of the statute. *Norwegian Nitrogen*

Co. v. *United States*, 288 U.S. 294, 315 (1933) (the administrative practice "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion"). As we have shown, no one at the time interpreted the 1918 Act to have repealed Section 92. The 1920 Senate compilation, which was prepared under the direction of the Comptroller of the Currency, showed Section 92 to be part of Section 13 of the Federal Reserve Act. S. Doc. No. 216, 66th Cong., 2d Sess. 146 (1920). So did the compilation prepared by the Federal Reserve Board following the 1918 amendment. Federal Res. Bd., *The Federal Reserve Act As Amended* 30 (1919). Section 92 appeared in the 1926 edition of the United States Code (and the 1928, 1934, 1940, and 1946 editions, too). It was not until 34 years after the 1918 amendment, when the 1952 edition of the United States Code was being prepared, that any question arose as to whether Section 92 was in force. But the contemporaneous views of Congress and the agencies charged with administering the federal banking laws—which have not changed since 1918—show that Section 92 was not repealed in 1918. It is that interpretation, rather than the views of the codifiers of the 1952 edition of the United States Code, to which deference is due in resolving ambiguity in the statute. Cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 843 (1984).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 92-484 and 92-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

STEPHEN L. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER UNITED STATES NATIONAL BANK OF OREGON

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. § 92, which authorizes national banks in certain circumstances to solicit and sell insurance, remains in force.

2. Should the court of appeals have determined whether 12 U.S.C. § 92 remains in force, where the parties neither presented nor took adverse positions on that issue.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the Independent Insurance Agents of Oregon, the National Association of Casualty & Surety Agents, the National Association of Surety and Bond Producers, the National Association of Life Underwriters, the National Association of Professional Insurance Agents, the Oregon Association of Life Underwriters, and the Oregon Professional Insurance Agents, Inc. were plaintiffs in the district court and appellants in the court of appeals. Robert L. Clarke, Comptroller of the Currency, and the Office of the Comptroller of the Currency were defendants in the district court and appellees in the court of appeals. The United States was a defendant in the district court.

The following information is provided under Rule 29.1 of the Rules of this Court: The parent company of petitioner United States National Bank of Oregon is U.S. Bancorp, whose shares are publicly held.

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BRIEF FOR PETITIONER UNITED STATES NATIONAL BANK OF OREGON

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a), is reported at 955 F.2d 731.[1] The opinion of the district court (Pet. App. 40a-66a) is reported at 736 F. Supp. 1162.

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[1] "Pet. App." refers to the appendix to the petition filed in No. 92-484.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 1992. Petitions for rehearing were denied on May 22, 1992. Pet. App. 30a. On August 7, 1992, the Chief Justice extended the time within which to file petitions for a writ of certiorari to and including September 21 in No. 92-484, and September 19 in No. 92-507. The petitions were filed on September 18, 1992, and were granted on December 14, 1992. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752 (a portion of which was codified at 12 U.S.C. § 92), is reprinted at Pet. App. 67a-76a. Section 5202 of the Revised Statutes is reprinted at Pet. App. 77a. Section 13 of the Federal Reserve Act, ch. 6, Pub. L. No. 63-43, 38 Stat. 251, 263-64 (1913), is reprinted at Pet. App. 77a-80a. Section 20 of the War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, 40 Stat. 506, 512, is reprinted at Pet. App. 80a-81a.

STATEMENT

A. The Statutory and Regulatory Scheme

1. Congress has vested the Comptroller of the Currency with substantial supervisory authority over the formation, supervision, and operation of national banks. The Comptroller exercises such authority principally under the National Bank Act (NBA), 12 U.S.C. §§ 21 *et seq.* *See, e.g., Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).[2]

[2] Congress has delegated to the Comptroller the authority for promulgating rules and regulations under the NBA. *See* 12 U.S.C. § 93a.

2. Under 12 U.S.C. § 92, which Congress enacted in 1916, a national bank

> located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State.

Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753.[3]

Under a longstanding regulation, the Comptroller has applied the authority set forth in Section 92 to any national bank branch office "located in a community . . . of less than 5,000," regardless of whether the bank's principal office is located in a larger community. 12 C.F.R. § 7.7100.[4] Under other regulations, the Comptroller has required any national bank wishing to perform such "new activities" through a subsidiary to submit a written proposal to the Deputy Comptroller for the

[3] As this Court has pointed out, "[w]hen the statutes were revised in 1918 and re-enacted, § 92 was omitted. The revisers of the United States Code have omitted it from recent editions of the Code." *Commissioner v. First Sec. Bank of Utah, N.A.*, 405 U.S. 394, 401 n.12 (1972).

Section 92 appeared in each edition of the United States Code until the 1952 edition. *See* 12 U.S.C. § 92 (1926); 12 U.S.C. § 92 (1928); 12 U.S.C. § 92 (1934); 12 U.S.C. § 92 (1940); 12 U.S.C. § 92 (1946). Section 92 no longer appears in the United States Code Annotated, *see* 12 U.S.C.A. § 92 (West 1989 & Supp. 1992), but it remains in the United States Code Service, *see* 12 U.S.C.S. § 92 (Law. Co-op. 1978 & Supp. 1992). For clarity, we cite to the statute as it appeared in the United States Code.

[4] The Comptroller first codified the regulation in 1971. *See* 36 Fed. Reg. 17,000, 17,015 (1971). The regulation stemmed from an interpretive ruling issued in 1963. *See* C.A. App. 99-100 ("C.A. App." refers to the joint appendix filed in the court of appeals).

district in which the bank's principal office is located. 12 C.F.R. § 5.34(d)(1)(i). After receiving the proposal, the Comptroller determines whether the activities would "exceed those legally permissible for a national bank's operating subsidiary." 12 C.F.R. § 5.34(d)(1)(iii); *see* Pet. App. 43a.

B. The Proceedings in This Case

1. Petitioner United States National Bank of Oregon is a national bank chartered under the NBA, with its principal office in Portland, Oregon. In October 1984, petitioner submitted a "new activities" proposal to the Comptroller's Western District. Invoking the authority set forth in Section 92, petitioner sought to offer, through a subsidiary, "a full range of insurance products" from one of petitioner's branch offices located in the small town of Banks, Oregon. Pet. App. 44a (internal quotation marks and citation omitted).

In August 1986, the Comptroller approved petitioner's proposal and thus authorized petitioner's subsidiary "to sell insurance to customers residing outside [Banks, Oregon]." Pet. App. 47a (internal quotation marks and citation omitted). After reviewing the text, legislative record, and purposes of Section 92, the Comptroller concluded that the statute permits petitioner

> at its operating subsidiary in Banks, Oregon, to sell insurance as agent to existing and potential customers regardless of where the insurance customers are located.

C.A. App. 69; *see* Pet. App. 47a-49a.[5]

2. In November 1986, respondents, various trade associations representing insurance agents and underwriters,

[5] The Comptroller, however, made clear that petitioner "could not sell insurance for a company to customers located in a state where the insurance company is not authorized to do business." C.A. App. 69; *see* Pet. App. 49a.

filed actions against the Comptroller in the United States District Court for the District of Columbia.[6] Respondents challenged the Comptroller's approval of petitioner's proposal arguing, among other things, that Section 92 must be construed as placing a geographical limit on the location of such insurance customers.[7] Respondents therefore contended that the Comptroller's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see* Pet. App. 3a.

On cross-motions for summary judgment, the district court in May 1990 upheld the Comptroller's approval of petitioner's proposal. Pet. App. 40a-66a. Although respondents raised no claim that Section 92 was not in force, the district court pointed out that Section 92 "no longer appears in the United States Code." Pet. App. 41a n.2. The court concluded, however, that that fact was immaterial "since Congress, other courts, and the Comptroller have presumed [the statute's] continuing validity." Pet. App. 41a n.2 (citations omitted).

Turning to the substantive issue, the court applied the framework set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),

[6] Petitioner intervened as an additional defendant after respondents had filed their complaints. *See* Pet. App. 41a. The district court later consolidated the substantially similar actions. Respondents also named the United States as a defendant. The district court later granted the Comptroller's unopposed motion to dismiss summarily the complaints against the United States. *See* Pet. App. 41a & n.1.

[7] Respondents raised, but later withdrew, a claim based on the restrictions on "branch banking" set forth in 12 U.S.C. §§ 36, 81. Pet. App. 49a n.16.

Respondents also raised claims under the Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. §§ 1841 *et seq.* The district court denied those claims, *see* Pet. App. 63a-65a, and the court of appeals had no occasion to review them. Accordingly, those claims are not at issue before this Court.

and concluded that Section 92 "is silent with respect to geographic limitations on sale and solicitation." Pet. App. 56a. Proceeding therefore to the second inquiry under *Chevron*, the court reviewed the Comptroller's construction of and decisions under Section 92 and held that "the Comptroller's interpretation, being rational and consistent with the statute, must be upheld." Pet. App. 63a (internal quotation marks and citations omitted). Accordingly, the court rejected respondents' challenge to the Comptroller's approval of petitioner's proposal. Pet. App. 65a-66a.

C. The Court of Appeals Decision

In February 1992, a divided panel of the court of appeals reversed. Pet. App. 1a-29a. Despite the fact that none of the parties had raised such a challenge, the court decided to address the question whether Section 92 remained in force.[8] The court determined that because placement of quotation marks shows that Congress originally enacted Section 92 as part of Section 5202 of the Revised Statutes, and then omitted the language of Section 92 from Section 5202 when the latter provision was amended in 1918,[9] Section 92 "has ceased to exist." Pet. App. 17a. The court thus held that the Comptroller's "ruling [was] not in accordance with law," without reaching the substantive issue resolved below. Pet. App. 18a.

Judge Silberman dissented. Pet. App. 23a-29a. In his view, "the majority is quite wrong in its perception of our judicial obligation." Pet. App. 25a. As Judge Silberman explained:

> We owe no abstract duty to Congress (or the President) to enforce or not to enforce laws; all of our power derives from our constitutional duty to decide cases and controversies. The issue of section 92's validity was decidedly not part of the "case or controversy" as it was brought to the district court or on appeal to us.

Pet. App. 25a. He therefore concluded that the court had improperly "created a controversy that did not exist." Pet. App. 25a. Accordingly, Judge Silberman would

> affirm the district court on the ground that the Comptroller's ruling is a reasonable interpretation of section 92, and note that we do not decide the significance of Congress' actions in 1918.

Pet. App. 29a.

The court of appeals later denied petitions for rehearing, together with suggestions for rehearing en banc. Pet. App. 30a-39a.[10]

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[8] In the court of appeals, no party (including respondents) or amicus curiae challenged the validity of Section 92. In their opening brief, respondents pointed out that although Section 92 "appears to have been repealed inadvertently in 1918[,] . . . Congress, the Comptroller, and the federal courts have, however, presumed that the statute remains in effect." Resp. C.A. Br. 5 n.3. In response to the court's *sua sponte* order requesting the parties to address that issue at oral argument on March 1, 1991, respondents' counsel candidly stated at that time that although

> [i]t would quite obviously be to [respondents'] advantage if section 92 were no longer in existence, . . . we have concluded that we cannot advance a substantial argument that section 92 no longer exists.

Pet. App. 24a. Indeed, in response to the court's second *sua sponte* order issued after oral argument that requested supplemental briefing, respondents expressly adhered to their position of accepting the validity of Section 92. *See* Resp. Supp. C.A. Br. 1-2; *see also* note 10, *infra*.

[9] *See* War Finance Corporation Act of 1918, ch. 45, Pub. L. No. 65-121, § 20, 40 Stat. 512.

[10] In submitting its court-ordered response to the petition for rehearing filed by the Comptroller and petitioner, respondents did an about-face and agreed with the court of appeals that Section 92 no longer remained in force. *See* Resp. C.A. Opp. to Pet. for Rehearing 2, 8-24; *see also* note 8, *supra*.

Judge Silberman dissented from the denial of rehearing. Pet. App. 30a. Judges Silberman, Williams, and D.H. Ginsburg dissented

[Continued]

SUMMARY OF ARGUMENT

I. The court of appeals invalidated Section 92 based on the placement of quotation marks in the original provision, the Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753. In the court's view, this punctuation reflected Congress's intention to make that provision part of Section 5202 of the Revised Statutes, which Congress amended in 1918 without including the language of Section 92 enacted in 1916. The court's analysis of the quotation marks in isolation is mistaken. All the available evidence—the language, structure, and subject matter of the statute—shows that Congress enacted Section 92 as an amendment to the Federal Reserve Act and did not repeal Section 92 in 1918 when it amended Section 5202 by the War Finance Corporation Act.

A. A close look at the 1916 enactment confirms that Congress intended to add what became Section 92 to Section 13 of the Federal Reserve Act of 1913, not to Section 5202 of the Revised Statutes. (For clarity, "Section 92" refers to the statutory text enacted in 1916.) The paragraph of the 1916 enactment immediately preceding the reference to Section 5202, and the paragraph of the 1916 enactment immediately preceding the reference to the Section 92 provision, each expressly refers to "this Act," *i.e.*, the Federal Reserve Act. By contrast, the Section 5202 reference in the 1916 enactment—which appears before the paragraph containing what became Section 92—concludes with a cross-reference to "the Federal reserve Act." This specific reference thereby demonstrates that the paragraph identified as "Fifth" marks the end of the Section 5202 reference. In other words, the language of the 1916

[10] [Continued]
from the denial of rehearing en banc, and would have limited rehearing to the issue of the court's authority to reach the question whether Section 92 remained in force. Pet. App. 35a-37a. Judge Sentelle, joined by Judges Buckley and Henderson, filed a separate opinion concurring in the denial of rehearing en banc that took issue with Judge Silberman's dissent. Pet. App. 33a-34a. Judge Randolph filed a separate statement. Pet. App. 38a-39a.

enactment shows that Congress intended that each of the paragraphs following the Section 5202 reference—including Section 92—would become part of the Federal Reserve Act.

This straightforward construction of the statute reveals the court of appeals' error in placing undue weight on the placement of punctuation. The placement of the punctuation in the final printed version of the 1916 enactment—setting off each paragraph after the sixth paragraph as part of Section 5202—should not control over the evidence in the text of the 1916 Act that Congress placed Section 92 in the Federal Reserve Act, not Section 5202 of the Revised Statutes.

The available legislative record confirms that Congress placed Section 92 in Section 13 of the Federal Reserve Act, not in Section 5202 of the Revised Statutes. That record also makes clear that Congress did not intend for the quotation marks to have any significance in interpreting the statute. Indeed, the contemporaneous legislative materials show that it was only in the versions reprinted in the House and Senate records—after the Conference Committee's final marked-up version showing Section 92 to be part of the Federal Reserve Act had been approved—that the inadvertent quotation marks appeared. This clerical insertion, or error, may not change the substance of Congress's intended enactment.

The subject matter of the banking statutes at issue—Section 5202 of the Revised Statutes, Section 13 of the Federal Reserve Act of 1913, and the 1916 amendments to the Federal Reserve Act—further demonstrates that Section 92 initially belonged in the Federal Reserve Act.

B. Congress did not repeal Section 92 by the 1918 War Finance Corporation Act. By its terms, the 1918 Act did not affect the status of the Federal Reserve Act, which contained Section 92. Instead, the 1918 Act

amended only one aspect of the national bank authority contained in Section 5202 of the Revised Statutes.

The legislative record surrounding the 1918 Act confirms what is apparent from the statutory text, namely, that Congress had no intention of repealing the national bank insurance authority recently enacted by Section 92. That record shows that there is no plausible basis for assuming that Congress, by enacting the 1918 Act in order to assist in financing the war effort, had any intention of repealing the unrelated bank authority set forth in Section 92. In these circumstances, the established rule against implied repeals should be followed.

C. The Comptroller, the Federal Reserve Board, the Congress, and the federal courts, including this Court, have uniformly considered Section 92 to be in effect since its inception. The texts and legislative record of the relevant statutes in this case do not support the conclusion that Section 92 was repealed. At the least, there is ambiguity. In such circumstances, that contemporaneous, longstanding, and uniform administrative, congressional, and judicial position regarding the validity of Section 92 is entitled to considerable weight.

II. The court of appeals should not have even had the opportunity to construe Section 92 erroneously out of existence. Despite the court's repeated invitation, no party raised the issue and no party contended that Congress had repealed Section 92 in 1918. That unasserted claim, by its terms, does not involve the jurisdiction of either the district court or the court of appeals. As such, the issue was not properly before the court. Similarly, the Section 92 issue does not involve the sort of "plain error" warranting departure from the general prohibition against addressing unasserted claims. Proper resolution of that issue is not beyond any doubt; nor is this a case where "injustice might otherwise result" if that issue had not been determined. *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

The court of appeals also erred by reaching out to nullify Section 92 by creating a controversy of its own making. That issue should not have been resolved where, as here, the parties neither presented nor took adverse positions on whether Section 92 remains in force.

ARGUMENT

I. SECTION 92 REMAINS IN FORCE

A. Congress Enacted Section 92 As Part Of The Federal Reserve Act Of 1913

The court of appeals declared that Section 92 no longer exists by focusing on punctuation contained in the original enrolled bill. More specifically, the court of appeals invalidated Section 92 based on the placement of quotation marks in the original provision, the Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753. *See* Pet. App. 7a-8a, 67a-72a. In the court's view, this punctuation reflected Congress's intention to make that provision part of Section 5202 of the Revised Statutes, which Congress amended in 1918 without including the language of Section 92 enacted in 1916. In concluding that Congress repealed Section 92 in 1918, the court of appeals ignored statutory language and overlooked pertinent aspects of the legislative record. All the available evidence—the language, structure, and subject matter of the statute—shows that Congress enacted Section 92 as part of the Federal Reserve Act of 1913 and did not repeal Section 92 in 1918 when it amended Section 5202 by the War Finance Corporation Act.

1. *The text of the 1916 Act shows that Congress enacted Section 92 as part of the Federal Reserve Act*

This Court has recently reiterated the "cardinal rule that a statute is to be read as a whole, . . . since the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) (citation omitted); *see, e.g., Shell Oil Co. v.*

Iowa Dep't of Revenue, 488 U.S. 19, 26 (1988). In other words, "'[i]n ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.'" *McCarthy v. Bronson*, 111 S. Ct. 1737, 1740 (1991) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)); *see United States v. Monia*, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting).

A close look at the 1916 enactment confirms that Congress intended to add what became Section 92 to Section 13 of the Federal Reserve Act of 1913,[11] not to Section 5202 of the Revised Statutes.[12] The paragraph of the 1916 enactment immediately preceding the reference to Section 5202 (that concerning Federal Reserve bank advances to member banks (paragraph 6)), and the paragraph of the 1916 enactment immediately preceding the reference to the Section 92 provision (that concerning Federal Reserve bank rediscounts of bills and acceptances (paragraph 8)), each expressly refers to "this Act," *i.e.*, the Federal Reserve Act. *See* Pet. App. 69a-70a. The fact that the second and third paragraphs of Section 13 of the Federal Reserve Act initially granted the banks such discount and rediscount authority further confirms that "this Act" refers to the Federal Reserve Act. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 263-64; Pet. App. 78a-79a; Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 752; Pet. App. 68a-69a (reenacting that discount and rediscount authority).

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[11] *See* Pub. L. No. 63-43, § 13, 38 Stat. 263-64 (1913); Pet. App. 77a-80a.

[12] Section 5202 of the Revised Statutes, originally enacted as part of the National Currency Act, *see* Act of Feb. 25, 1863, ch. 58, § 42, 12 Stat. 677; Act of June 3, 1864, ch. 106, § 36, 13 Stat. 110, dealt exclusively with limits on the indebtedness of national banks. *See* Pet. App. 77a; pp. 19-20, *infra*.

By contrast, the Section 5202 reference in the 1916 enactment (paragraph 7)—which appears before the paragraph containing what became Section 92 (paragraph 9)—concludes with a cross-reference to "the Federal reserve Act." This specific reference thereby demonstrates that the paragraph identified as "Fifth" marks the end of the Section 5202 reference. See Pet. App. 70a. In other words, the "language of the statute itself" [13] shows that Congress intended that each of the paragraphs following the Section 5202 reference—including Section 92—would become part of the Federal Reserve Act.[14]

Respondents argue, however, that the reference to "this Act" in the paragraphs preceding the references to Section 5202 and Section 92 in the 1916 enactment "could serve simply as an antecedent reference" to the Federal Reserve Act. Br. in Opp. 14. That argument ignores the components of the 1916 enactment, namely, the precise language of the 1913 Act which had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 79a-80a. That amendment to Section 5202 of the Revised Statutes, by necessity, referred to the "Federal Reserve Act." Pet. App. 80a. By contrast, the concluding paragraph of the 1913 Act, which concerned Federal Reserve bank rediscounts of bills and acceptances, referred expressly to "this Act," namely, the Federal Reserve Act. *See* Pet. App. 80a. That concluding paragraph, which was obviously part of the Federal Reserve Act, appears in the 1916 enactment immediately preceding the reference to Section 92. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753; Pet. App. 70a (paragraph 8). Respondents' "antecedent reference"

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[13] *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979).

[14] If, however, Congress had sought to incorporate Section 5202 into the Federal Reserve Act, it presumably would have referred to "this Act" as opposed to referring explicitly to "the Federal reserve Act."

theory therefore breaks down. The reference to "this Act" in the rediscount provision (paragraph 8)—a part of the Federal Reserve Act—confirms that the Section 5202 reference had ended.

Respondents also assert that "the phrase 'this Act' in the paragraph preceding Section 92 may refer to nothing other than the 1916 Act itself." Br. in Opp. 14. That argument fails because the reference to "this Act" in the 1916 enactment appears verbatim in Section 13 of the Federal Reserve Act of 1913. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 80a. In other words, Congress was referring to the original Federal Reserve Act—not the 1916 enactment itself.[15]

Undaunted, respondents contend that the construction outlined above—although anchored to the statutory text—"does violence to express statutory language" because it requires the Court to ignore the prefatory language that Section 5202 " 'is hereby amended [so] to read as follows.' " Br. in Opp. 15; *see* Pet. App. 70a. That prefatory language appears in Section 13 of the 1913 Act, where Congress had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 79a-80a. In order to amend Section 13 in 1916, Congress restated that provision of the Federal Reserve Act in its entirety. In so doing, the 1916 Act restated verbatim a portion of the 1913 Act that referred to amending Section 5202,

[15] Moreover, at various places in the 1916 Act, Congress referred to the following provisions: "section nineteen of this Act," 39 Stat. 752; Pet. App. 67a, "section 13 of this Act," 39 Stat. 754; Pet. App. 73a, and "section 14 of this Act," 39 Stat. 754; Pet. App. 73a. Apart from the fact that the substance of these references coincides with the subject matter of the Federal Reserve Act, the fact that the 1916 Act was not divided into numbered sections makes it plain that the phrase "this Act" can refer only to the Federal Reserve Act.

but the 1916 Act did not change that 1913 amendment. *See* Pet. App. 70a, 79a-80a.[16]

This straightforward construction of the statute, as described above, reveals the court of appeals' error in placing undue weight on the placement of punctuation. This Court has instructed lower courts, when construing statutes, to "disregard the punctuation, or . . . repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83 (1932); *see Crawford v. Burke*, 195 U.S. 176, 192 (1904) ("So little is punctuation a part of statutes that courts will read them with such stops as will give effect to the whole."); *Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837) ("[p]unctuation is a most fallible standard by which to interpret a writing"); *cf. Taylor v. United States*, 495 U.S. 575, 581-99 (1990) (Congress intended to retain the statutory definition of "burglary" despite repealing the pertinent definitional provision). The placement of the punctuation in the final printed version of the 1916 enactment—setting off each paragraph after paragraph 6 as part of Section 5202, *see* Pet. App. 70a-73a—should not control over the evidence in the text of the 1916 Act that Congress placed Section 92 in the Federal Reserve Act, not Section 5202 of the Revised Statutes.

[16] The title of the 1916 enactment, "An Act To amend certain sections of the Act entitled 'Federal reserve act,' approved December twenty-third, nineteen hundred and thirteen," 39 Stat. 752; Pet. App. 67a, confirms this point. As shown above, Congress was not amending Section 5202 in 1916, and the title of the 1916 enactment describes precisely what Congress sought to accomplish. *See INS v. National Ctr. for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 556 (1991) (a statute's title "can aid in resolving an ambiguity in the legislation's text" (citations omitted)).

2. *The legislative record confirms that Congress enacted Section 92 as part of the Federal Reserve Act*

The available legislative record confirms what is apparent from the face of the 1916 enactment—that Congress placed Section 92 in Section 13 of the Federal Reserve Act, not in Section 5202 of the Revised Statutes. That record also shows that Congress did not intend for the quotation marks to have any significance in interpreting the statute.

The committee bill that became the 1916 enactment, H.R. 13391, as initially considered by the Senate, did not contain the paragraph that would become Section 92. That bill happened to use quotation marks, but inconsistently. *See* S. Rep. No. 481, 64th Cong., 1st Sess. 1-3 (1916) (Pet. Ldg. 1-2).[17] Quotation marks appeared after the provision stating that Section 13 of the Federal Reserve Act was "amended to read as follows," and closing quotation marks did not appear until after the paragraph regarding the regulation of discounting of bills of exchange and acceptances authorized by the Federal Reserve Act.[18] *See* S. Rep. No. 481, *supra*, at 1-2 (Pet. Ldg. 1-2); *see also* 53 Cong. Rec. 10,998 (1916) (Pet. Ldg. 9). The final paragraph, concerning foreign acceptances (which was printed in italics in the committee bill because it was to be added to existing law), had no quotation marks at all. *See* S. Rep. No. 481, *supra*, at 3 (Pet. Ldg. 2).

On July 17, 1916, Senator Owen, the Chairman of the Committee on Banking and Currency, introduced the amendment proposing Section 92. *See* 53 Cong. Rec. 11,153 (1916) (Pet. Ldg. 10). During the debates, after

[17] "Pet. Ldg." refers to the various contemporaneous legislative materials cited in this section of petitioner's brief that have been lodged with the Clerk of the Court.

[18] This paragraph ultimately preceded Section 92 in the bill as enacted.

Section 92 had been introduced and added,[19] Senator Brandegee commented on the committee's use of quotation marks, and asked Senator Owen whether he thought that "the amended sections ought to be left in quotation marks, so that they will appear that way in the Federal reserve act?" 53 Cong. Rec. 11,155 (Pet. Ldg. 30). Senator Owen agreed that although the committee report had used quotation marks, he did "not think they should be used." *Ibid.* Instead, he thought that the quotation marks "should be omitted." *Ibid.* Senator Brandegee then suggested "that in the reprint to be made of the bill the quotation marks be omitted." *Ibid.* Senator Owen responded that he "accept[ed] that amendment." *Ibid.* The Senate adopted the amendment without objection. *Ibid.*[20]

As a result, the reprint of the amended bill, as passed by the Senate in late July 1916, contained no potentially confusing quotation marks in the section amending Section 13 of the Federal Reserve Act, which included Section 92. *See* H.R. 13391, 64th Cong., 1st Sess. § 13 (1916) (Pet. Ldg. 31-48). It was thus clear that the reference to Section 5202 of the Revised Statutes concluded with the paragraph identified as "Fifth," thus placing Section 92 squarely within the Federal Reserve Act.

The bill then proceeded to the Conference Committee. The committee's final working version of the section amending Section 13 of the Federal Reserve Act was printed without quotation marks in Section 13. *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916)

[19] The Senate's printed working version of the bill contains the quotation marks as they appeared in the committee bill. *See* H.R. 13391, 64th Cong., 1st Sess. (1916) (Pet. Ldg. 11-29). The printed amendment inserting Section 92 does not contain quotation marks. *See* Pet. Ldg. 18.

[20] Review of the Senate's printed working version of the bill shows that, as a result of the colloquy and amendment described above, the printed quotation marks were then crossed out by hand. *See* Pet. Ldg. 11-29. One quotation mark was inadvertently missed. *See* Pet. Ldg. 18.

(Pet. Ldg. 49-51). The Committee's final marked-up version, however, was changed. This version, to which the House agreed in late August 1916, contained handwritten quotation marks only at the beginning of each paragraph; the version to which the Senate agreed, however, did not contain quotation marks.[21] The House marked-up version, which was apparently slated to be printed as the final bill, and the Senate version, again each ensured that Section 92 would be placed within the Federal Reserve Act, not within Section 5202 of the Revised Statutes.

It was only in the versions reprinted in House and Senate records—after the Conference Committee's final marked-up version had been approved—that the inadvertent quotation marks appeared, thus sowing the confusion that led the court of appeals astray.[22] This clerical insertion, or error, in view of the context outlined above, may not change the substance of Congress's intended enactment. Indeed, the drafting history of this legislation confirms the wisdom of one court's recognition that "[t]he presence or absence of a comma, according to the whim of the printer or proof reader, is so nearly

[21] *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (Pet. Ldg. 49-53); H.R. Res., 64th Cong., 1st Sess. (1916) (agreeing to H.R. Conf. Rep. No. 1175) (Pet. Ldg. 56); S. Res., 64th Cong., 1st Sess. (1916) (agreeing to H.R. Conf. Rep. No. 1175) (Pet. Ldg. 57).

The Senate's marked-up version of the Conference Committee report, H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (Senate mark-up) (Pet. Ldg. 58-62), and the Senate's printed final version of that report, *see* S. Doc. No. 533, 64th Cong., 1st Sess. (1916) (Pet. Ldg. 65-70), each contained no potentially confusing quotation marks in the section amending Section 13 of the Federal Reserve Act. The House of Representative's printed final version of the Conference Committee report also contained no such punctuation. *See* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (House final printed version) (Pet. Ldg. 72-75).

[22] *See Journal of the House of Representatives* 994-95 (1916) (Pet. Ldg. 77-78); 53 Cong. Rec. 13,258-59, 13,354-55 (1916) (Pet. Ldg. 79-80, 81-82).

fortuitous that it is a wholly unsafe aid to statutory construction." *Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917).[23]

3. *The subject matter of the banking statutes at issue demonstrates that Section 92 initially belonged in the Federal Reserve Act*

The subject matter of the banking statutes at issue—Section 5202 of the Revised Statutes, Section 13 of the Federal Reserve Act of 1913, and the 1916 amendments to the Federal Reserve Act—further demonstrates that Section 92 initially belonged in the Federal Reserve Act.

Congress originally enacted Section 5202 of the Revised Statutes during the Civil War as part of the National Currency Act of 1863. *See* Act of Feb. 25, 1863, ch. 58, § 42, 12 Stat. 677, *repealed by* Act of June 3, 1864, ch. 106, § 36, 13 Stat. 110.[24] That provision of the

[23] Accordingly, the pertinent statutory language and legislative record effectively rebut whatever presumption may arise from the omission of Section 92 from the more recent versions of the United States Code. *See* 1 U.S.C. §§ 112, 204(a); *United States v. Bergh*, 352 U.S. 40, 47 (1956).

[24] Section 42 of the National Currency Act provided in pertinent part:

> That no association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in, and remaining undiminished by losses or otherwise, except on the following accounts, that is to say:
>
> First. On account of its notes of circulation.
>
> Second. On account of moneys deposited with, or collected by, such association.
>
> Third. On account of bills of exchange or drafts drawn against money actually on deposit to the credit of such association, or due thereto.
>
> Fourth. On account of liabilities to its stockholders, for money paid in on capital stock, and dividends thereon, and reserved profits.

12 Stat. 677.

[Continued]

Act had a limited purpose; it generally prohibited excess indebtedness of national banks, *i.e.*, those commercial banks federally chartered under the Act. In 1878, the Revised Statutes of the United States were first published. The Revisers placed Section 36 of the Act in Section 5202 of the Revised Statutes with stylistic, but no substantive, changes. *See* Pet. App. 77a.[25]

In 1913, Congress augmented the nation's banking system by enacting the Federal Reserve Act. *See* Federal Reserve Act, ch. 6, Pub. L. No. 63-43, 38 Stat. 251 (1913) . The Act established centralized federal banking authority and provided for the Federal Reserve Board to oversee the twelve Federal Reserve banks and the other member banks of the Federal Reserve system. The Act also required every national bank to become a member of the Federal Reserve system and to purchase stock and maintain reserves in that system. *See* 38 Stat. 251-53. In particular, Section 13 of the Act set forth the several powers of Federal Reserve banks, such as the authority to accept, discount, and rediscount various forms of notes

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[24] [Continued]

Section 36 of the 1864 Act provided in pertinent part:

> That no association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on the following accounts, that is to say: —
>
> First. On account of its notes of circulation.
>
> Second. On account of moneys deposited with, or collected by, such association.
>
> Third. On account of bills of exchange or drafts drawn against money actually on deposit to the credit of such association, or due thereto.
>
> Fourth. On account of liabilities to its stockholders for dividends and reserved profits.

13 Stat. 110.

[25] The National Currency Act was later recodified as part of the National Bank Act, 12 U.S.C. §§ 21 *et seq.*

and commercial paper, including those issued by national banks. *See* 38 Stat. 263-64; Pet. App. 77a-79a.

The establishment of national bank membership in the Federal Reserve system called for Congress to amend certain provisions of the National Currency Act. As relevant here, Congress amended the limitations of national bank indebtedness set forth in Section 5202 of the Revised Statutes. In Section 13 of the Federal Reserve Act, Congress therefore added a fifth provision to the exceptions set forth in Section 5202, *i.e.*, "liabilities incurred under the provisions of the Federal Reserve Act," 38 Stat. 264; Pet. App. 80a.

In 1916, Congress amended certain provisions of the Federal Reserve Act, including Section 13, which had set forth the powers of Federal Reserve banks. Among other things, Congress expanded those Section 13 powers by authorizing Federal Reserve banks to make short term advances and acquire foreign acceptances. *See* 39 Stat. 753, 754; Pet. App. 69a-70a, 71a-72a. In order to amend those Section 13 authorizations in 1916, Congress restated that provision in its entirety. In so doing, the 1916 Act therefore restated verbatim a portion of the 1913 Act that referred to amending Section 5202 of the Revised Statutes. The 1916 Act, however, did not at all change substantively the 1913 amendment to that provision regarding national bank authority. *See* Pet. App. 70a, 79a-80a.

That point is confirmed by Congress's amendment in 1916 to the Federal Reserve bank rediscount authority established by Section 13 of the Federal Reserve Act. That provision appears in the 1913 Act after the reference to Section 5202. By its terms, that particular provision belongs in the Federal Reserve Act. *See* 38 Stat. 264; Pet. App. 80a. In 1916, Congress amended that Federal Reserve Act authorization to include authorizations for discount and purchase, including those for "foreign bills of exchange, and of acceptances authorized by this Act." 39 Stat. 753; Pet. App. 70a. In other words, in 1916 Con-

gress was amending the Federal Reserve Act, not Section 5202.

As part of the 1916 amendments to Section 13 of the Federal Reserve Act, Congress also enacted Section 92. Congress's placement of that provision in the Federal Reserve Act, as opposed to Section 5202 of the Revised Statutes, is understandable. Section 5202 is a discrete provision of the original National Currency Act that dealt exclusively with limits on indebtedness of national banks. Congress would have no reason to tack onto this provision the entirely distinct subject matter of Section 92—insurance agency and real estate brokerage powers of national banks.

Moreover, Section 92 arose out of the Comptroller's written proposal to Congress in July 1916, when Congress was considering legislation to amend the Federal Reserve Act. See 53 Cong. Rec. 11,001 (1916). Congress thus reasonably used that existing legislative vehicle to accomplish the goal of augmenting national banks' authority—a point confirmed by the floor colloquy between Senator Owen and Senator Brandegee. *See* 53 Cong. Rec. 11,155 (Pet. Ldg. 30); pp. 16-17, *supra*. Indeed, other provisions of the Federal Reserve Act amended in 1916 fulfilled the same purpose. *See, e.g.*, 39 Stat. 754-56; Pet. App. 74a-76a.[26]

B. Congress Did Not Repeal Section 92 By The 1918 War Finance Corporation Act

1. *The 1918 Act did not affect the status of the Federal Reserve Act*

In 1918, Congress enacted the War Finance Corporation Act, ch. 45, Pub. L. No. 65-121, 40 Stat. 506 (1918), to aid the effort to finance World War I. By its terms,

[26] The provisions of the original National Currency Act happened to appear in scattered sections of the Revised Statutes. As Congress was creating entirely new authority for national banks by enacting Section 92, it would have decided that amendment of an existing section of the Revised Statutes was impracticable.

the 1918 Act did not affect the status of the Federal Reserve Act, which contained Section 92. Instead, the 1918 Act amended only one aspect of national bank authority contained in Section 5202 of the Revised Statutes.

As part of the 1918 legislation, Congress amended the limitations of national bank indebtedness set forth in Section 5202 of the Revised Statutes. In Section 20 of the 1918 Act, Congress therefore added a sixth provision to the exceptions set forth in Section 5202, *i.e.*, "Liabilities incurred under the provisions of the War Finance Corporation Act." 40 Stat. 512; Pet. App. 81a. Congress did not mention the language of Section 92 when it amended Section 5202. That circumstance, however, could not conceivably effect a repeal of Section 92. As shown above, Congress had not placed Section 92 within Section 5202 in the first instance.[27]

2. *There is no indication that Congress intended to repeal Section 92 in 1918*

The legislative record surrounding the 1918 Act confirms what is apparent from the statutory text, namely, that Congress had no intention of repealing the national bank insurance authority recently enacted by Section 92. Rather, Congress simply conferred on national banks an additional unrelated authority to make advances to corporations without treating the loans as in indebtedness. The purpose of the War Finance Corporation Act was limited:

> The bill is purely a war measure designed to conserve the supply of labor and materials for the purposes of the war, and to help supply the war's finan-

[27] The 1918 Act contained a blanket provision declaring that "all provisions of any Act or Acts inconsistent with the provisions of this Act are hereby repealed." 40 Stat. 515. The national bank insurance authority contained in Section 92 was scarcely "inconsistent" with the financing efforts engendered by the War Finance Corporation Act. *See United States v. Claflin*, 97 U.S. 546, 548-49 (1878).

> cial requirements, and to give them a first claim on capital seeking investment in like manner as the war's material requirements have been given a first claim on production.

S. Rep. No. 286, 65th Cong., 2d Sess. 4 (1918) (statement of W.B. McAdoo, Secretary of the Treasury). That specific purpose bore no relation whatsoever to national bank insurance authority.

The purpose of the amendment to Section 5202 of the Revised Statute set forth in Section 20 of the 1918 Act was similarly tied to that overarching concern of financing the war effort. Section 20, a House floor amendment, sought to further that effort by permitting national banks to make advances to corporations without treating the loans as an indebtedness. As Representative Kitchin explained:

> If we do not put in this provision, and make the change in the law which this amendment makes, it will tie the hands of the national banks from helping these corporations.
>
> * * * * *
>
> I think there were some of the committees that had this amendment under consideration and thought that this section of the Revised Statutes should not apply to this limitation.

56 Cong. Rec. 3804 (1918). The House Conference Report confirms that explanation:

> This section provides that section 5202 of the Revised Statutes of the United States relating to the indebtedness of a national banking association shall not apply in the case of any liability incurred by such association under the provisions of the War Finance Corporation act. This provision does not appear in the Senate bill. The conferees adopt the House section.

H.R. Conf. Rep. No. 448, 65th Cong., 2d Sess. 19 (1918); *see* 56 Cong. Rec. 4457 (1918).

Indeed, the Comptroller's contemporaneous report to Congress further demonstrates the limited purpose of Section 20 of the 1918 Act. In the report, the Comptroller described that provision as "amend[ing] section 5202 [of the Revised Statutes], so as to exempt from the liabilities which may be incurred by national banks those incurred under the provisions of the war finance act." *Annual Report of the Comptroller of the Currency* 79, 171 (1918).

The evident purpose of Section 20 of the 1918 Act therefore had no relation to the national bank insurance authority conferred by Section 92. It is thus understandable that Congress made no mention of Section 92 during its consideration of the 1918 Act.[28] In the face of that legislative record, there is no plausible basis for assuming that Congress, by enacting the War Finance Corporation Act in 1918, had any intention of repealing the national bank insurance authority it had adopted two years before. *Accord American Land Title Ass'n v. Clarke*, 968 F.2d 150, 151-54 (2d Cir. 1992), *petitions for cert. pending* (Nos. 92-482 & 92-645).

3. *Section 92 should not be subject to an implied repeal*

This Court has adhered to "[t]he cardinal rule . . . that repeals by implication are not favored." *Posados v. National City Bank*, 296 U.S. 497, 503 (1936); *see Morton v. Mancari*, 417 U.S. 535, 549 (1974); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). In order to effect a repeal, "[t]he intention of the legislature to repeal must be clear and manifest." *Watt v. Alaska*, 451 U.S. 259, 267 (1981) (internal quotation marks and citations omitted); *see Red Rock v. Henry*, 106 U.S. 596, 602 (1883).

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[28] *See* H.R. Conf. Rep. No. 448, 65th Cong., 2d Sess. (1918); 56 Cong. Rec. 2777-805, 2847-61, 2913-27, 3039-53, 3081-109, 3130-51, 3293-96, 3605-32, 3659-87, 3779-812, 3843-45, 4373-79, 4452-63 (1918).

Here, there is no evidence that Congress intended to repeal Section 92 in 1918. To the contrary, all the available evidence—the text and legislative record of the 1918 War Finance Corporation Act—show conclusively that Congress did not seek to repeal the national bank insurance authority recently enacted by Section 92. Instead, Congress was tackling a wholly unrelated issue, namely, financing the war effort and enabling national banks to contribute to that effort.

C. The Uniform Consideration By The Comptroller, The Federal Reserve Board, The Congress, And The Federal Courts Regarding The Validity Of Section 92 Is Entitled To Considerable Weight

This Court has recognized that the "uniform construction" of a statute by the appropriate authorities is entitled to considerable weight when confronted with an issue of statutory interpretation. *Wisconsin v. Illinois*, 278 U.S. 367, 413 (1928); *see, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1934). Here, the Comptroller, the Federal Reserve Board, the Congress, and the federal courts, including this Court, have uniformly considered Section 92 to be in effect. Although such consideration cannot revive a repealed statute, the texts and legislative record of the relevant statutes in this case do not support the conclusion that Section 92 was repealed. At the least, there is ambiguity.[29] In such circumstances, that informed and unanimous position should have been enforced, not jettisoned as the court of appeals chose to do.

The canon of statutory construction discussed above applies with particular force, where, as here, the pertinent regulatory authorities have contemporaneously construed the statute. This Court has long concluded:

[29] As the court of appeals itself acknowledged, the statutory analysis confirming Section 92's validity is "plausible." Pet. App. 17a.

> In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

Edward's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827); *accord Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315 (1933) (interpretation entitled to "peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting the machinery in motion"); *see Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 97 (1983); *United States v. Shreveport Grain & Elevator Co.*, 284 U.S. at 84.

Since its enactment in 1916, the Comptroller and the Federal Reserve Board, the two regulators with principal authority over the banking statutes at issue, have considered Section 92 to be part of the Federal Reserve Act and to remain in effect. Both the Comptroller and the Federal Reserve Board, in compilations of pertinent banking statutes submitted to Congress in 1917, each set forth Section 92 as part of the Federal Reserve Act.[30] The year before, the Comptroller in its Annual Report had also expressed the same view. *See Annual Report of the Comptroller of the Currency* 925 (1916).[31] More-

[30] *See* S. Doc. No. 412, 64th Cong., 1st Sess. 83-84, 136-37 (1917) (Comptroller's compilation entitled "The National Bank Act as Amended, the Federal Reserve Act, and Other Laws Relating to National Banks") (Perhaps as a matter of caution, the Comptroller also set forth Section 92 as part of the Revised Statutes.); *Third Annual Report of the Federal Reserve Board* 135-36 (1917); *see also* Federal Reserve Board, *The Federal Reserve Act As Amended* 30 (1917) (placing Section 92 and companion paragraphs in Section 13 of the Federal Reserve Act, although reproducing the confusing punctuation of the Statutes at Large).

[31] Accordingly, the court below erred in assuming that "there were only three sources to which [the 65th Congress] could turn for up-to-date information: the Statutes at Large, . . . or either of two privately published services." Pet. App. 11a.

over, in a post-1918 compilation, the Federal Reserve Board continued to show Section 92 as part of Section 13 of the Federal Reserve Act. *See* Federal Reserve Board, *The Federal Reserve Act As Amended* 30 (1919).

The uniform position adopted by the Comptroller, the Federal Reserve Board, the Congress, and the federal courts regarding the continuing validity of Section 92 should also be followed. Since Section 92's enactment in 1916, the Comptroller has issued regulations on bank insurance activities. *See* 22 Fed. Reg. 10,075 (1957) (amending 1916 regulation); *see also* 12 C.F.R. § 7.7100; note 2, *supra*. Until 1932, the Comptroller reported statistics on bank insurance activities authorized under Section 92 to Congress.[32] Most importantly, when asked to comment on the subject, the Comptroller has made it clear to Congress that the office had consistently taken the position that Section 92 was not part of Section 5202 of the Revised Statutes and was not repealed inadvertently in 1918.[33]

Congress has similarly considered Section 92 to remain in effect since the date of its enactment. In a post-1918 statutory compilation, for example, the Senate Committee on Banking and Currency, the committee that oversaw implementation of the banking laws, continued to show Section 92 in effect as part of Section 13 of the Federal Reserve Act. *See* S. Doc. No. 216, 66th Cong., 2d Sess. 146 (1920).

During the late 1950s, Congress considered whether Section 92 had been inadvertently repealed. In response

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[32] *See Financial Institutions Act of 1957: Hearings on S. 1451 and H.R. 7206 before the House Comm. on Banking and Currency*, 85th Cong., 2d Sess., pt. 2, at 1068 (1958) ("*House Hearings*").

[33] *See House Hearings* 1036 (letter from Comptroller Gidney to House Banking Chairman Spence). The Comptroller's letter was accompanied by a supporting memorandum prepared by the Federal Reserve Board. *See id.* at 1036-40.

to Representative Patman's assertion that the statute was repealed,[34] Congress received contrary submissions from the Comptroller and other authorities, including the general counsel to the Housing Banking Committee, the counsel to the Advisory Committee for the Study of Federal Statutes Governing Financial Institutions and Credits, and the Library of Congress's Legislative Reference Service. Each of these submissions made it clear that Section 92 remained in effect.[35]

In view of these submissions, it is not surprising that Congress has affirmatively treated Section 92 to be in effect. In 1982, for example, Congress amended an aspect of Section 92 unrelated to the insurance provision. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(b), 96 Stat. 1510-11. In 1987, Congress imposed a one-year moratorium on the expansion of insurance activities "pursuant to the Act of September 7, 1916 (12 U.S.C. 92)." Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 583.[36] And in 1991, Congress considered—but did not enact—legislation that would have substantially

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[34] *See House Hearings* 989-90, 1060-63.

[35] *See House Hearings* 1065-71, 1010-25, 1063-65; note 33, *supra*. The House Banking Committee ultimately issued no formal opinion regarding the validity of Section 92. *See House Hearings* 1090, 1199. Several years later, the staff of a subcommittee of the House Banking Committee concluded that Section 92 had been repealed. *See Consolidation of Banking Examining and Supervisory Functions, 1965: Hearings on H.R. 107 and H.R. 6885 before the Subcomm. on Bank Supervision and Insurance of the House Comm. on Banking and Currency*, 89th Cong., 1st Sess. 3, 391 (1965).

[36] In imposing that moratorium, Congress did not at all question the validity of Section 92. *See, e.g.*, S. Rep. No. 19, 100th Cong., 1st Sess. 17 (1987) ("Existing law authorizes a national bank 'located and doing business in any place the population of which does not exceed five thousand inhabitants' to act as an insurance agent. The scope of that authority is currently in dispute.").

amended Section 92 and curtailed national banks' insurance activities.[37]

Federal courts, including this Court in *Commissioner v. First Sec. Bank of Utah, N.A.*, 405 U.S. 394, 401 & n.12 (1972), following the lead of the regulatory authorities and the Congress, have similarly considered Section 92 to have remained in force.[38] Indeed, in reviewing a challenge to the Comptroller's administration of the insurance authority granted by Section 92, this Court recognized that the Comptroller's "administrative interpretation over many years is entitled to great weight." *Commissioner v. First Sec. Bank of Utah, N.A.*, 405 U.S. at 403 n.16. Moreover, in light of this unbroken line of authority, the Fifth Circuit has remarked that "further discussion of the issue [of Section 92's existence] seems moot." *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261 n.6 (5th Cir. 1980).

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[37] *See* H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 1, at 81-82, 192 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 4, at 56-57, 154 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); S. Rep. No. 167, 102d Cong., 1st Sess. 170-71, 480 (1991) (describing proposed § 771 of S. 543, 102d Cong., 1st Sess. (1991)).

[38] *See, e.g., American Land Title Ass'n v. Clarke*, 968 F.2d 150, 151-54 (2d Cir. 1992), *petitions for cert. pending* (Nos. 92-482 & 92-645); *Independent Ins. Agents of America, Inc. v. Board of Governors of the Fed. Reserve System*, 736 F.2d 468, 477 (8th Cir. 1984); *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164, 1170 & nn.18-20 (D.C. Cir. 1979); *First Nat'l Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261-62 & n.6 (5th Cir. 1980); *Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1013 (5th Cir. 1968); *Commissioner v. W. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966); *Genessee Trustee Corp. v. Smith*, 102 F.2d 125, 127 (6th Cir. 1939); *Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 33 (E.D. Ky. 1992), *appeals pending*, Nos. 92-6330 & 92-6331 (6th Cir.); *Thompson v. Kerr*, 555 F. Supp. 1090, 1096 (S.D. Ohio 1982); *Guaranty Mortgage Co. v. Z.I.D. Assocs., Inc.*, 506 F. Supp. 101, 104 (S.D.N.Y. 1980).

This longstanding—and uniform—administrative, congressional, and judicial position regarding the validity of Section 92 should not be cast aside. As this Court has recognized in analogous circumstances:

> When a court reaches the same reading of the statute as the practical construction given it by the enforcing agencies over a 60-year period, that is a powerful weight supporting such reading. Here, moreover, the business community directly affected and the enforcement agencies and the Congress have read this statute the same way for 60 years. . . . While these views are not binding on this Court, the weight of informed opinion over the years strongly supports [acceptance of that construction of the statute].

Bankamerica Corp. v. United States, 462 U.S. 122, 132 (1983) (construing Clayton Act). Those principles likewise call for this Court to conclude that, in view of the authorities cited above, Section 92 remains in existence.

II. THE COURT OF APPEALS ERRED IN DETERMINING WHETHER SECTION 92 REMAINS IN FORCE

A. The Court Of Appeals Should Not Have Determined Whether Section 92 Remains In Force Because That Issue Did Not Involve Plain Error Or The Court's Jurisdiction

Under well-established federal appellate procedure, courts are obliged to treat unasserted claims as waived and not properly before them. *See, e.g., McCormick v. United States*, 111 S. Ct. 1807, 1814 n.6 (1991); *Kamen v. Kemper Fin. Servs.*, 111 S. Ct. 1711, 1718 n.5 (1991); *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). That procedure is fundamental to our method of adjudicating controversies:

> The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases,

distinguishes our adversary system of justice from the inquisitorial one.

United States v. Burke, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring in the judgment). In other words, such a requirement ensures "[a] fair adversary process [that] presupposes both a vigorous prosecution and a vigorous defense" of the issues in dispute. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978); *see Baker v. Carr*, 369 U.S. 186, 204 (1962).

That fundamental procedural principle, as with other legal rules, is subject to certain exceptions. First, an appellate court may consider an unasserted claim if it involves the court's jurisdiction. *See, e.g., Collins v. Youngblood*, 497 U.S. 37, 41 (1990); *Gutierez v. Waterman S.S. Co.*, 373 U.S. 206, 209 (1963). Second, an appellate court may consider such a claim if it involves plain error "where injustice might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *see, e.g., Singleton v. Wulff*, 428 U.S. at 121; *Turner v. City of Memphis*, 369 U.S. 350, 353 (1962) (*per curiam*); *see also United States v. Atkinson*, 297 U.S. 157, 160 (1936).

Here, it is plain that the court of appeals glossed over these principles and erroneously reached out to consider whether Congress had inadvertently repealed Section 92. Despite the court's repeated invitation, no party raised the issue and no party contended that Congress had repealed Section 92 in 1918. *See* note 8, *supra*. That issue, by its terms, does not involve the jurdisdiction of either the district court or the court of appeals.[39] As such, the issue was not properly before the court.

Similarly, the Section 92 issue does not involve the sort of "plain error" warranting departure from the general

[39] The district court exercised jurisdiction over respondents' administrative challenge to the Comptroller's decision under 28 U.S.C. §§ 1331, 1337, and 1361. The court of appeals exercised jurisdiction over the appeal under 28 U.S.C. § 1291.

prohibition against addressing unasserted claims. The court of appeals' resolution of the Section 92 issue can certainly not be said to be beyond any doubt. *Compare Turner v. City of Memphis*, 369 U.S. at 353 ("On the merits, no issue remains to be resolved. This is clear under prior decisions and the undisputed facts of the case."). The court of appeals itself acknowledged that the statutory analysis confirming Section 92's validity is "plausible." Pet. App. 17a.[40] Indeed, the continuing validity of Section 92 had understandably remained unchallenged in—and had even been ratified by—the reported case law.[41]

Nor is this a case where "injustice might otherwise result" if the Section 92 issue had not been determined. *Hormel v. Helvering*, 312 U.S. at 557. To the contrary, the court of appeals' reaching out to resolve the issue threatened the settled state of affairs that had given rise to widespread and substantial national and state bank insurance activities across the country.[42] Thus,

[40] During oral argument before the court of appeals, respondents' counsel stated that "we cannot advance a substantial argument that section 92 no longer exists." Pet. App. 24a.

[41] For that reason, this is not a case where the court was confronted with the "need [to] render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it." *United States v. Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring in the judgment).

[42] The Office of the Comptroller of the Currency has estimated that at least 179 national banks are engaged in insurance operations under the aegis of Section 92. In addition, the Comptroller has estimated that at least 115 state-chartered banks sell insurance under state parity laws that permit such banks to engage in the same activities as national banks. *See* Declaration of Rosa M. Koppel, Esq., Office of the Comptroller of the Currency ¶¶ 6, 7 (Apr. 14, 1992), *Owensboro Nat'l Bank v. Moore, supra; see, e.g.*, Ariz. Rev. Stat. Ann. § 6-184.2 (1956); Ill. Rev. Stat. ch. 17, para. 311(11) (1992); Md. Fin. Inst. Code Ann. § 5-504 (1992); N.D.

> [i]njustice is more likely to result from [the court's] reaching the issue [of the validity of Section 92] than from [the court's] declining to do so, because [that] question . . . affects many entities, including members of the insurance and banking industries who have relied on the law's continued existence . . . .

Pet. App. 29a (Silberman, J., dissenting).

B. The Court Of Appeals Should Not Have Determined Whether Section 92 Remains In Force, Where The Parties Neither Presented Nor Took Adverse Positions On That Issue

The court of appeals' consideration of the Section 92 issue conflicts with another established legal doctrine. This Court has made clear that Congress has not conferred—and may not confer—"jurisdiction on Art. III federal courts to render advisory opinions, . . . because suits of this character are inconsistent with the judicial function under Art. III." *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citations omitted); *see, e.g., Muskrat v. United States*, 219 U.S. 346 (1911). As this Court has instructed, a prohibited advisory opinion is "an abstract determination by the Court of the validity of a statute . . . or a decision advising what the law would be on a hypothetical state of facts." *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, 288 U.S. 249, 262 (1933) (citations omitted).

Here, the court of appeals reached out to nullify Section 92 by creating a controversy of its own making. As this Court has cautioned, federal courts should not strive to resolve issues that the parties have not properly presented where, as here, the issue concerns the validity of an Act of Congress. *See Williams v. Zbaraz*, 448 U.S.

Cent. Code § 6-03-38 (1987); Utah Code Ann. § 7-3-10(1) (1953); *see also* U.S. Pet., No. 92-507, at 19 n.11 ("Whatever the exact figure, it is clear that a significant number of national banks currently engage in activities authorized by Section 92.").

358, 367 (1980) (district court exceeded jurisdiction by invalidating federal statute where parties had not challenged it). Indeed, that prohibition applies with particular force in this case, because federal courts "do not sit . . . to give advisory opinions about issues as to which there are not adverse parties before [the courts]." *Princeton Univ. v. Schmid*, 445 U.S. 100, 102 (1982) (*per curiam*).[43] The critical point remains that, until ordered to respond to petitions for rehearing filed by the Comptroller and petitioner, respondents expressly adhered to the position that Section 92 remained good law. *See* notes 8, 10, *supra*.[44] As the validity of Section 92 was affirmatively uncontested, that issue should have remained undecided.

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[43] *See Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.").

[44] Respondents err (Br. in Opp. 23 n.30) in asserting that the court of appeals' decision may be excused under the principle that courts need not accept "stipulations as to questions of law." *Estate of Sanford v. Commissioner*, 308 U.S. 39, 51 (1939); *see* Pet. App. 33a (Sentelle, J., concurring in the denial of rehearing *en banc*). The parties did not reach any stipulation. To the contrary, the record shows that the parties reached the same conclusion that Section 92 remained valid.

Moreover, contrary to respondents' suggestion (Br. in Opp. 23 n.31), the fact that the parties here each took the position that Section 92 remained good law is not tantamount to putting that question of law "in controversy."

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1993

Nos. 92-484 and 92-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Respondents.

STEPHEN L. STEINBRINK,
ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

STATEMENT

A. Background

To protect the integrity of the banking system, prevent unfair competition, and safeguard the general public, federally-regulated banking institutions, including national banks, are generally prohibited from engaging in the business of insurance. Section 24 of the National Bank Act, 12 U.S.C. § 24 (Seventh), which sets forth the powers of national banks, has been consistently inter-

preted as strictly limiting the permissible insurance-agency activities of national banks.[1]

In 1916, then-Comptroller John Skelton Williams urged Congress to enact a narrow exception to this general prohibition to provide a modicum of financial assistance to nationally-chartered banks located in "small country communities," which had experienced financial difficulties. 53 Cong. Rec. 11001 (1916) (Resp. Ldg. 26).[2] Empowering these "small national banks" to sell insurance would "provide them with additional sources of revenue," and thereby ensure that inhabitants of sparsely populated areas had access to banking services. *Id.*[3] Comptroller Williams noted that under the National Bank Act, national banks were not then given the power to act as agents for insurance companies. *Id.*, citing *Logan County Nat'l Bank v. Townsend*, 139 U.S. 67 (1891).

Comptroller Williams drafted proposed legislation authorizing national banks located in towns of not over 3,000 population to act as insurance agents. *Id.* Because the proposed amendment granted a new power to national banks, he recommended that it be added to the National Bank Act, and specifically drafted his proposal as an amendment to the National Bank Act. *See id.* The National Bank Act, at the time, was codified in the Revised Statutes. *See infra* n.19. Senator Owen introduced the Comptroller's proposed legislation (changing

[1] *See, e.g., Saxon v. Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010, 1016 (5th Cir. 1968) (under Section 24(7), "no national banks possessed *any* power to act as insurance agents") (emphasis in original).

[2] "Resp. Ldg." refers to the various legislative materials and pleadings cited by respondents that have been lodged with the Clerk of Court.

[3] Comptroller Williams made clear that country banks should be permitted to sell insurance only in their local communities, for then their insurance activities would not be "likely to assume such proportions as to distract the officers of the bank from the principal business of banking." *Id.*

the 3,000 figure to 5,000)[4] as an amendment to a bill already under consideration by the 1916 Congress, and moved that the amendment be inserted after the introductory phrase: "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows." *See* 53 Cong. Rec. 11153 (1916) (Pet. Ldg. 10). Section 5202 of the Revised Statutes was part of the National Bank Act. The amendment was agreed to by the Senate without debate, *id.*, and was later codified (for a time) as Section 92 of the National Bank Act. As of 1952, however, the codifiers have omitted Section 92 from the U.S. Code.

B. Proceedings In This Case

1. Petitioner, United States National Bank of Oregon (the "Bank") is a national bank with its principal place of business in Portland, Oregon. In 1984, the Bank applied to petitioner the Comptroller of the Currency to establish a new subsidiary in a community with a population of less than 5,000 for the purpose of offering a full range of insurance products. 92-428 Pet. App. 44a. In August 1986, the Comptroller approved the Bank's application. The Comptroller concluded that, pursuant to Section 92, "a national bank or its branch which is located in a place of 5,000 or under population may sell insurance to existing and potential customers *located anywhere*." 92-507 Pet. App. 75a (emphasis added).

2. Respondents[5] challenged the Comptroller's ruling in the United States District Court for the District of

[4] This was the only apparent change from the Comptroller's drafted proposed amendment to the National Bank Act. *See* 53 Cong. Rec. 11153 (1916). In making the change, Senator Owen stated that "[t]he matter is unimportant either way." *Id.*

[5] Independent Insurance Agents of America, Inc.; Independent Insurance Agents of Oregon; National Association of Casualty and Surety Agents; National Association of Life Underwriters; National Association of Professional Insurance Agents; National Association of Surety and Bond Producers; Oregon Association of Life Underwriters; and Oregon Professional Insurance Agents, Inc.

Columbia, arguing that the agency's approval was arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law, pursuant to 5 U.S.C. § 706(2)(A).[6] Respondents contended that the Comptroller's action would authorize national banks to enter the general insurance business in violation of Section 92. In their summary judgment brief, respondents noted:

> [a]s a technical matter, Section 92 may no longer exist. The 1916 amendments to Section 5202 of the Revised Statutes included, *inter alia*, the provisions that became 12 U.S.C. § 92. In 1918, Section 5202 was re-enacted but, for some unknown reason, the provisions of 12 U.S.C. § 92 were omitted from the recodification.[7]

Respondents acknowledged that Congress and courts had treated Section 92 as existing, but respondents themselves took no position on the issue. *Id.*

The district court observed that Section 92 "no longer appears in the United States Code," and concluded that the statutory provision "apparently was inadvertently repealed in 1918." 92-507 Pet. App. 44a n.2. The court nonetheless "assume[d] that the statute exists *in proprio vigore*," because "Congress, other courts and the Comptroller have presumed its continuing validity." *Id.* The district court went on to affirm the Comptroller's action as authorized by Section 92.

3. In their opening brief to the court of appeals, respondents stated that Section 92 "appears to have been repealed inadvertently in 1918," but again noted that others had "presumed" its validity.[8] The court of appeals

[6] The Bank intervened as a defendant.

[7] Memorandum in Support of Cross-Motion of Plaintiffs for Summary Judgment and in Opposition to Motions of Defendants and Defendant-Intervenor for Dismissal and/or Summary Judgment, at 14 n.9 (filed 3/11/87).

[8] Brief of Appellants, at 5 n.3 (filed 12/21/90).

ordered the parties to be prepared to address Section 92's status at oral argument, and there was specific questioning on the issue.[9] More than five months later, the court ordered the parties to submit post-argument briefs (1) addressing whether the court should resolve the question of Section 92's validity, and (2) providing additional support for 92's continued existence. Although the Comptroller argued, in response, that the court should not reach the issue, respondents maintained that resolving the question of Section 92's validity would decide respondents' claim and then went on to explain that there was conflicting post-1918 evidence on the issue.[10]

The court of appeals reversed the district court, concluding that Section 92 was repealed and, once repealed, could only be reinstated by Congress, which has not done so. Noting that Section 92's omission from the U.S. Code gives rise to a statutory presumption of invalidity, *see* 1 U.S.C. § 204(a), the court concluded that it "not only [had] the right to inquire into its validity, [it had] the duty to do so." 92-507 Pet. App. 6a. The court of appeals recognized that courts must sometimes go beyond

[9] Counsel for respondents stated that he did not believe he could contest Section 92's existence given that the Supreme Court, while noting Section 92's curious history, has presumed its validity. Transcript of Oral Arg. at 3-4.

[10] *See* Supplemental Brief of Appellants (filed 9/25/91). As respondents explained in their post-argument brief, in 1982, they had advocated the revision of the Bank Holding Company Act to make clear that holding companies could engage in insurance sales in only a few narrowly circumscribed instances. In this context, respondents supported a provision explicitly designed to parallel Section 92. *See* 12 U.S.C. § 1843(c)(8)(C)(i). That support necessarily assumed the continued existence of Section 92. For this reason, if for no other, respondents felt it would be viewed as inconsistent to argue before the court of appeals that Section 92 is not valid. However, the court having itself broached the issue, respondents urged the court to resolve it. On the merits, respondents took no position on whether Section 92 was valid or not.

the specific legal theories advanced by the parties. *Id.* 5a-6a.

The court carefully examined the text of the Statutes at Large and concluded that "the language and punctuation . . ., traditionally construed, support the codifier's conclusion that Section 92 was repealed." *Id.* 10a. The court found that Section 92 had been enacted by Pub. L. No. 64-270, 39 Stat. 752, 753 (1916) (the "1916 Act"), and concluded that, "on its face, the 1916 [Act] had the effect of placing section 92 within section 5202 of the Revised Statutes." 92-507 Pet. App. 9a.[11] The court observed that the War Finance Corporation Act of 1918, Pub. L. No. 65-121, § 20, 40 Stat. 506, 512 (1918) (the "1918 Act"),[12] which states that it *amends* Rev. Stat. § 5202 "to read as follows," omits the paragraph now known as Section 92 from its statement of the entire text of the amended Section 5202. Accordingly, the court concluded that Section 92 is deemed repealed. 92-507 Pet. App. 9a-10a.

The court of appeals rejected petitioners' invitation to override "a literal reading of the 1916 and 1918 statutes." *Id.* 10a. The court refused to ignore the quotation marks used in the 1916 Act to define the amended Rev. Stat. § 5202: "Like it or not, they are an integral part of the bill that the President signed into law and that was enrolled in the Statutes at Large." *Id.* 19a. The court concluded that petitioners had failed to produce any concrete evidence demonstrating that the 1918 Congress did not intend to repeal Section 92. *Id.* The court then pointed to evidence indicating that the 1918 Congress would have realized that Section 92's exclusion from the amended Rev. Stat. § 5202 would result in its repeal: three extant sources as to current law at the time

[11] *See* 92-507 Pet. App. 23a-25a. The 1916 Act is reproduced in full in Resp. Ldg. 27-31.

[12] *See* 92-507 Pet. App. 26a. The 1918 Act is reproduced in full in Resp. Ldg. 52-62

reported that, as a result of the 1916 Act, Section 92 was part of Rev. Stat. § 5202. *Id.* 12a-13a.

After noting that post-1918 views with respect to Section 92's existence were not unanimous, the court ruled that subsequent treatment of Section 92 by Congress, agencies and the courts could not resolve whether the 1918 Congress had repealed the provision. *Id.* 12a-13a, 15a-16a. No subsequent Congress had re-enacted Section 92, and "[f]ederal agencies have no authority to reinstate a statute that Congress has repealed." *Id.* 15a. No prior court had found that Section 92 remains valid; at most, they had merely *presumed* that it does. *Id.* 15a-18a.

Finally, the court declined to rewrite history:

> It is one thing for a court to bend statutory language to make it achieve a clearly stated congressional purpose; it is quite another for a court to reinstate a law that, intentionally or unintentionally, Congress has stricken from the statute books. If the deletion of section 92 was a mistake, it is one for Congress to correct, not the courts.

Id. 19a-20a.

Judge Silberman, dissenting, did not disagree with the majority's conclusion regarding Section 92's non-existence. Instead, he disagreed with the court's decision to reach the issue, concluding that respondents' failure to challenge Section 92's validity should have ended the matter. Judge Silberman did *not* assert that the court was without power to address the issue, but rather that it should have refrained from doing so as a matter of "judicial restraint." *Id.* 27a-33a.

Petitioners sought rehearing. No member of the court of appeals voted to reconsider the majority's conclusion that Section 92 had been repealed. Judge Silberman, joined by two other judges, voted to reconsider only whether the court should have reached the question. Judge Sentelle, joined by Judges Buckley and Henderson,

responded that "it is within the Court's power to determine the existence of a statute essential to the determination of a case or controversy whether or not the parties assume or stipulate that the statute does or does not exist." *Id.* 37a.

SUMMARY OF ARGUMENT

The intentions of individual members of the Senate and House of Representatives become law only through a formal process strictly defined by Article I of the Constitution. Courts interpret and apply the law that emerges. Separation of powers principles fundamental to our constitutional scheme, however, preclude courts from ignoring the law or correcting it, even when Congress' actions appear sloppy, inadvertent, or mistaken.

The statutory provision at issue here was enacted in 1916 as part of Rev. Stat. § 5202, as is clear from the text of the enrolled bill and Statutes at Large. When Rev. Stat. § 5202 was amended and restated two years later, Section 92 was omitted. Congress thereby expressly repealed Section 92, whether accidentally or intentionally is irrelevant. Congress' 1918 repeal is final until *Congress* changes the status quo by taking the appropriate formal legislative actions defined in the Constitution, federal statutes, and House and Senate rules. Congress has not done so. Section 92 thus does not exist.

Petitioners ask this Court to ignore the text of the statute enacted by the 1916 Congress and the text of the amendments enacted by a later Congress in 1918. Petitioners instead would have this Court foray into "what-if's." What would Congress have done if it had expressly debated whether Section 92 should be incorporated into the Revised Statutes or the Federal Reserve Act? What would Congress have done if it had expressly debated the future of bank-run insurance operations? What would a "sensible" Congress have done? The Court is not free to undertake such a journey.

Petitioners' argument depends on the Court's willingness to take two critical steps. First, the Court must ignore the punctuation Congress chose to use in the 1916 Act to mark the beginning and end of the amended Rev. Stat. § 5202. Petitioners' argument hinges on removal of these quotation marks—for with the marks, there can be no question whatsoever that Section 92 was enacted as an amendment to Rev. Stat. § 5202, and therefore was repealed by its omission from Section 5202 as restated in the 1918 Act. Second, the Court must ignore Congress' express statement in the 1916 Act that it was *amending* Rev. Stat. § 5202. Petitioners' argument is premised on the proposition that, despite the plain meaning of the text it enacted, the 1916 Congress merely restated Rev. Stat. § 5202 unchanged—for if Rev. Stat. § 5202 was amended by the 1916 Act, Section 92 was unquestionably included as part of that amendment, and was then repealed in 1918.

The "enrolled bill" doctrine precludes courts from looking to pre-enactment legislative materials to override the contents of the enrolled bill. *Marshall Field Co. v. Clark*, 143 U.S. 649 (1892). This Court must accept the 1916 Act as Congress enacted it. It cannot assume that the quotation marks were unintended. In any event, even without the quotation marks, the text of the 1916 Act, especially its use of introductory phrases, shows that Section 92 was made part of Rev. Stat. § 5202. Moreover, placing Section 92 in Rev. Stat. § 5202 was entirely consistent with the substance of the federal banking laws, as Rev. Stat. § 5202 was a part of the National Bank Act, the paramount source of national banks' powers. Section 92 was proposed and drafted by then-Comptroller Williams as an amendment to the National Bank Act. Congress acted directly upon Comptroller Williams' proposal, without debate.

Petitioners' attempt to concoct a different interpretation of the text is unavailing. The 1916 Act's failure to state expressly *in its title* that the Act amended Rev.

Stat. § 5202 is meaningless. Legislation often included amendments that were not announced in the title. Likewise, Congress' use of the phrase "this Act" is merely a reference to the "Federal Reserve Act"; it says nothing about the *placement* of Section 92.

Nor can petitioners garner support for their argument from the subsequent actions of Congress, the courts, and the federal banking agencies. Even if the texts of the statutes were ambiguous—and they are not—an agency's view on whether a particular statutory provision was enacted or repealed is not entitled to deference; that is a quintessential judicial judgment. In any event, the contemporaneous view of the agency charged with implementing Section 92 was that it was enacted as an amendment to Rev. Stat. § 5202. Court decisions offer no support because no court prior to the D.C. Circuit had decided whether Section 92 was repealed. Post-1918 Congresses differed as to whether Section 92 existed. When in the 1980s, Congress apparently presumed Section 92's continued existence, Congress was mistaken. That mistake casts no light on what the 1916 and 1918 Congresses did. Nor does it revive the repealed statute. No Congress has re-enacted Section 92. Even if this Court believes that Section 92's repeal was inadvertent, it is Congress that must correct the "mistake."

The Bank, but not the federal petitioners, contend that the court of appeals should not have even reached the question of Section 92's validity because respondents did not allege that it was repealed. The federal petitioners, on the other hand, recognize that the court was empowered to address this issue because it is simply alternative reasoning that resolves respondents' claim that the Comptroller cannot rely upon Section 92 to empower national banks to sell insurance outside small towns; it is not a separate and distinct claim. The court's exercise of discretion to resolve the issue here was clearly proper: the alternative would be to interpret a statute the court believed did not exist. And the court provided all interested parties with ample opportunity to address the issue before the court resolved it.

ARGUMENT

I. THE TEXT OF THE 1916 AND 1918 ACTS DEMONSTRATES THAT CONGRESS REPEALED SECTION 92 IN 1918.

A. Separation of Powers Principles Dictate That This Court Accept What Congress Did and Refrain From Considering What a Purportedly "Sensible" Congress Would Have Done.

"This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 109 S.Ct. 647, 658 (1989). Congress has the sole power and authority to make law. The Framers of the Constitution carefully crafted the procedures that must be followed in adopting, amending or repealing legislation.[13] "[T]he prescription for legislative action in Article I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *INS v. Chadha*, 462 U.S. 919, 951 (1983). The bicameral and presentment requirements of Article I are critical to the constitutional design. *Id.* at 946-951.

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[13] The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U.S. Const., Art. I, § 1. Before it becomes law, a bill must pass both the Senate and the House of Representatives and be presented to the President for approval or disapproval, in which case it must be repassed by two thirds of the Congress. U.S. Const., Art. I, § 7, cls. 2 & 3. There is "[n]o provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Article I." *INS v. Chadha*, 462 U.S. 919, 954 n.18 (1983).

Once these requirements are fulfilled, the legislation becomes the law of the United States. The judiciary may not second-guess the law's existence or non-existence. *See Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892). "Mutual regard between the coordinate Branches, and the interest of certainty, both demand that official representations regarding such matters of internal process be accepted at face value." *United States v. Munoz-Flores*, 110 S.Ct. 1964, 1978-79 (1990) (Scalia, J., concurring). The courts are properly confined to interpreting the law as it exists, applying it to particular situations, and assessing whether it is consistent with the Constitution. Courts are *not* empowered to enact, amend or repeal laws—on policy or other grounds. Any attempt to do so threatens the delicate balance of power the Constitution has struck.

These fundamental principles dictate the proper analysis in this case. "Based on separation of powers considerations, the [enrolled bill] doctrine precludes judicial inquiry into any procedural defects that take place before the executive has signed the bill." *Cherry v. Steiner*, 716 F.2d 687, 693 n.5 (9th Cir. 1983), *cert. denied*, 466 U.S. 931 (1984). Courts must accept the contents of statutes as they have been enrolled and printed in the Statutes at Large.[14] This Court cannot, in the guise of statutory construction, ignore the statutory text. Petitioners effectively urge this Court "to first determine the legislative intentions and then proceed to change the words used in an attempt to justify the predetermined conclusion"; this, the Court cannot do. *DeSoto Secs. Co. v. Commissioner of Internal Rev.*, 235 F.2d 409, 411 (7th Cir. 1956).

"It is not a function of this Court to presume that Congress was unaware of what it accomplished." *Albernaz v. United States*, 450 U.S. 333, 342 (1981) (in-

[14] The "enrolled bill" is the document that has passed both Houses of Congress and is signed by the presiding officers of both Houses and sent to the President. 1 U.S.C. § 106. Once signed by the President, it is sent directly to the Archivist of the United States, 1 U.S.C. § 106a, who compiles and publishes the Statutes at Large in conformance with the enrolled bills. 1 U.S.C. § 112.

ternal quotations omitted). Thus, if the repeal of Section 92 was "inadvertent," it is of no significance. It is not this Court's task to correct mistakes or remedy congressional inadvertence. As the Court made clear in *West Virginia Univ. Hosp. Inc. v. Casey*, 111 S.Ct. 1138 (1991), "it is not our function to eliminate clearly expressed inconsistency of policy, ... The facile attribution of congressional 'forgetfulness' cannot justify such a usurpation." *Id.* at 1148. Here, as in *West Virginia Univ. Hosp.*, " '[w]hat the government asks is not a construction of the statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.' " *Id.*, quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926). *See also United States v. Goldenberg*, 168 U.S. 95, 103 (1897) ("Certainly, there is nothing which imperatively requires the court to supply an omission in the statute, or to hold that Congress must have intended to do that which it has failed to do.").

The proper branch of government to fill gaps created by repeals—whether inadvertent or not—is the legislative branch. *See, e.g., Whitney v. State Tax Comm'n*, 309 U.S. 530, 535-37 (1940).[15] It is Congress' role to craft and

[15] It is not unusual for the legislature to "inadvertently" repeal statutory provisions when making later legislative adjustments; when the "mistake" is discovered, it is corrected. The legislature is empowered and institutionally capable of making such corrections. *See, e.g., Whitney v. State Tax Comm'n of New York*, 309 U.S. 530, 536 (1940) (legislature filled "unintended" holes it had earlier created); *United States v. Riker*, 670 F.2d 987, 988 (11th Cir. 1982) (Congress closed loophole created by earlier "inadvertent[] repeal"); *United States v. Hayes*, 653 F.2d 8, 16 (1st Cir. 1981) (1980 Congress enacted legislation to fill void created when 1970 Congress "inadvertently repealed" statutory provision); *Texaco v. Louisiana Land & Exploration*, 805 F. Supp. 385, 388 (M.D. La. 1992) (legislature "corrected its oversight" in inadvertently repealing provision two years earlier); *Cornelius v. Facilities Mngmt. Co.*, 375 F. Supp. 916, 917 (D. Hawaii 1974) (same). *See also Narlidis v. Sewell*, 524 F.2d 371, 373 n.1 (9th Cir. 1975) (acknowl-

enact legislation; Congress may not constitutionally delegate that responsibility to the courts. If the repeal of Section 92 was a "mistake," it is for Congress to correct. This Court "should not legislate for them." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 427 (1985). *Accord Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 364-65 (1986).

B. The Text of the Statutes at Large Demonstrates That Section 92 Was Repealed by the 1918 Act.

Congress has established strict rules of statutory recognition. It has directed that the "*current*" version of the U.S. Code "establish[es] prima facie the laws of the United States." 1 U.S.C. § 204(a) (emphasis added). Petitioners concede, as they must, that Section 92 does not appear in the Code. This creates a strong presumption that the law does not exist. *See United States v. Bergh*, 352 U.S. 40, 47 (1956) (exclusion of statutory provision from Code is evidence of repeal). The Code may be overridden by the Statutes at Large, if the two conflict. *United States v. Welden*, 377 U.S. 95, 98 n.4 (1964). *See* 1 U.S.C. § 112 ("Statutes at Large shall be legal evidence of laws . . . in all the courts of the United States."). In this case, however, the Statutes at Large confirm the codifiers' conclusion that Section 92 was repealed. Petitioners thus must overcome a strong presumption against their position that Section 92 exists.

To overcome this presumption, petitioners must make a convincing case that the 1918 Act did not in fact repeal Section 92. That issue, all parties agree, turns on whether the 1916 Congress enacted Section 92 as an amendment to Rev. Stat. § 5202. If so, as every court

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edging that repeal in 1915 may have been by "mistake"; Executive Order issued in 1966 filled gap). Indeed, in 1983, corrections to the Garn-St Germain Depository Institutions Act, Pub. L. No. 97-320, restored inadvertently omitted provisions of the Revised Statutes. *See* Sections 20 and 23 of Pub.L. 97-457, 96 Stat. 2509-2510 (1983) (Joint Resolution to "make technical corrections to certain banking and related statutes").

that has addressed the issue has concluded,[16] then Section 92 was repealed in 1918.

Petitioners fall far short of the mark. They have not made a plausible, much less a convincing, case that the 1916 Act placed Section 92 in Section 13 of the Federal Reserve Act rather than in Rev. Stat. § 5202. Indeed, their argument requires this Court to ignore unambiguous indications of congressional intent in favor of dubious inferences from offhand remarks in the legislative history and ambiguous post-enactment activity. At bottom, petitioners seek to divert this Court from the proper course of deciding what Congress did, in an effort to induce this Court to vindicate their vision of what rational 1916 and 1918 Congresses ought to have done.

A properly circumspect application of principles of statutory construction defeats petitioners' case. As will be demonstrated, the text of the 1916 Act (its language and punctuation) clearly places Section 92 within Rev. Stat. § 5202, and this placement is entirely consistent with the subject matter of the federal banking laws. Having been adopted as an amendment to Rev. Stat. § 5202, Section 92 was then repealed by the express language of the 1918 Act.

1. The Text Enacted by Congress and Approved by the President Unquestionably Proves Section 92's Repeal.

As petitioners concede, the quotation marks in the Statutes at Large make clear that Section 92 was added as an amendment to Rev. Stat. § 5202 in the 1916 Act and was repealed by the 1918 Act.[17] Gov't Br. at 14-15;

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[16] *See* 92-507 Pet. App. 8a-9a; *American Land Title Ass'n v. Clarke*, 968 F.2d 150, 151-52 (2d Cir. 1992) (petns. for cert. pending); *see also Owensboro Nat'l Bank v. Moore*, 803 F. Supp. 24, 35 (1992) (adopting *American Land Title* opinion) (appeal pending).

[17] Those commentators who examined the issue in the mid-1950's agreed. *See Financial Institutions Act of 1957, Hearings Before*

Bank Br. at 15. In 1913, Congress enacted what was to become known as the "Federal Reserve Act." Pub. L. No. 63-43, § 13, 38 Stat. 251 (1913) (the "1913 Act").[18] The 1913 Act also amended Rev. Stat. § 5202. In making the amendment, the 1913 Act set forth the full text of the amended Rev. Stat. § 5202, prefacing the new law with the following statement:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

38 Stat. 264 (Resp. Ldg. 14). It is undisputed that this language amended Rev. Stat. § 5202, which was a part of the National Bank Act,[19] and *not* a part of the Federal Reserve Act. The two statutes were entirely separate and served different functions: The National Bank Act was focused narrowly on the establishment and government of nationally chartered banks; the Federal Reserve Act was broad-ranging legislation establishing the Federal Reserve system (made up of Federal Reserve Banks), designed to foster the flow of credit and money, through both state and national banks, to facilitate the Nation's orderly economic growth.

The 1916 Act revised several portions of the 1913 Act. It also enacted what came to be known as Section 92. The critical language of the 1916 Act, exactly as it appears in the Statutes at Large, begins with the phrase (without quotation marks):

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the Comm. on Banking and Currency, House of Representatives, on S. 1451 and H.R. 7026, 85th Cong., 2d Sess. 1023, 1037, 1064, 1065-66 (1958) ("*House Hearings*").

[18] *See* 92-507 Pet. App. 21a-22a. The 1913 Act is reproduced in full in Resp. Ldg. 1-25.

[19] Rev. Stat. § 5202 was based on Section 36 of the National Bank Act of 1864 (Act of June 3, 1864), ch. 106, § 36, 13 Stat. 99, 110. *See* Gov't Br. at 19 n.6. Other provisions of the National Bank Act appeared in other sections of the Revised Statutes. *See generally Twin City Nat'l Bank v. Nebecker*, 167 U.S. 196 (1897).

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

39 Stat. 753 (Resp. Ldg. 28). Each subsequent paragraph begins with a quotation mark but does not end with a quotation mark, until the paragraph following what became Section 92. 39 Stat. 753-54 (Resp. Ldg. 28-29). Such opening and closing quotation marks are the conventional and accepted style for defining the beginning and end of a multi-paragraphed body of text.[20] Thus, by its express terms as set out in the enrolled bill and Statutes at Large, the 1916 Act included Section 92 in the amended Rev. Stat. § 5202.

In 1918, Congress again amended and restated Rev. Stat. § 5202. Again, the critical language of the 1918 Act, as it appears in the Statutes at Large, begins:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

40 Stat. 512 (Resp. Ldg. 59). Each subsequent paragraph begins with a quotation mark but does not end with a quotation mark, until the paragraph adding an exemption for "Liabilities incurred under the provisions of the War Finance Corporation Act." *Id.* It is undisputed that Section 92 was not included in the 1918 restatement of Rev. Stat. § 5202.

On its face, the 1918 Act demonstrates that Section 92 was repealed. As the court of appeals concluded "the

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[20] *See, e.g.*, Manual of Style, § 89 (1910); The Chicago Manual of Style, § 10.25 at 289 (13th ed. 1982); Webster's Ninth New Collegiate Dictionary 968 (1988) (quotation mark is "used chiefly to indicate the beginning and the end of a quotation in which the exact phraseology of another or of a text is directly cited"); *Nashville Milk Co. v. Carnation Co.*, 238 F.2d 86, 89 (7th Cir. 1956) (use of quotation marks "is significant to one who is accustomed with the procedures used in drafting bills and amendments thereto in the Congress of the United States"), *aff'd*, 355 U.S. 373 (1958).

meaning of Section 92's omission is plain; material omitted on reenactment is deemed repealed." 92-507 Pet. App. 9a. It is a fundamental tenet of statutory construction that the phrase "amended to read as follows" indicates an intention to effect a complete substitution of text for the former law; all matter that is omitted from the amendment is considered repealed. 1A N. Singer, Sutherland Statutory Construction § 22.32 at 279 and § 23.12 at 355 (4th ed. 1985).[21] *See also Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 373 (1905) ("[I]t cannot in reason be said that the omission . . . gives rise to the implication that it was the intention of Congress to re-enact it."); *Murphy v. Utter*, 186 U.S. 95, 104-105 (1902) (language of statute that provided that a prior enactment "be, and is hereby, amended so as to read as follows . . . is not that of an amending act, but that of a repeated and substituted act"). Thus, the 1918 Act "by its terms" repealed those sections of Rev. Stat. § 5202 not repeated. *See Robertson v. Seattle Audubon Soc.*, 112 S.Ct. 1407, 1414 (1992). "[T]he intent to modify was not only clear, but express." *Id.* Furthermore, Congress specifically provided "[t]hat all provisions of any Act or Acts inconsistent with the provisions of [the 1918] Act are hereby repealed." 40 Stat. 515 (Resp. Ldg. 61). As set out in the 1916 Act, Rev. Stat. § 5202 was "inconsistent" with the 1918 Act in so far as it included material omitted from Rev. Stat. § 5202 as restated in the 1918 Act. Therefore, those inconsistent provisions, including Section 92, were expressly repealed by the repealing clause.[22]

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[21] *E.g., H. Rouw Co. v. Crivella*, 105 F.2d 434, 436 (8th Cir. 1939), *rev'd on other grounds*, 310 U.S. 612 (1940) (Congress enacted law curing effect of prior repeal); *Foreman v. United States*, 26 Cl.Ct. 553, 559 (1992); *United States v. Baker*, 189 F. Supp. 796, 801-02 (W.D. Pa. 1960), *aff'd* 293 F.2d 613 (3d Cir.), *cert. denied*, 368 U.S. 914 (1961); *United States v. One Ice Box*, 37 F.2d 120, 123 (N.D. Ill. 1930);

[22] Petitioners do not endorse the reasoning employed by the Second Circuit in *sua sponte* reaching its conclusion that Section 92 was not repealed. Indeed, none of the commentators who has examined the issue has agreed with the Second Circuit. In *American Land Title*, the Second Circuit concluded that, as the text clearly indicates, Congress enacted Section 92 as an amendment to Rev. Stat. § 5202 in the 1916 Act, and obviously omitted Section 92 when it restated Rev. Stat. § 5202 in the 1918 Act. 968 F.2d at 151-52. But the Second Circuit concluded that, contrary to their plain meaning, the words "amended to read as follows" do not effect a repeal of Section 92. *Id.* at 154. The Court noted that, in exceptional cases, the literal interpretation "'must yield where [its] application would be inconsistent with the purposes of the statute.'" *Id.* at 152, quoting *FTC v. Standard Motor Products, Inc.*, 371 F.2d 613, 617 (2d Cir. 1967). However, as the D.C. Circuit correctly observed, "[t]he inconsistency found in those . . . cases was one where the literal application of a statutory phrase . . . would have *frustrated* a clearly stated purpose of the amendments." 955 F.2d at 737 (emphasis added). There is no such *inconsistency* here: the elimination of national banks' power to sell insurance in small towns does not inherently contradict or interfere with the successful prosecution of the war (one stated purpose of the 1918 Act). In the end, the Second Circuit's decision is driven by the 1918 Congress' silence regarding the repeal of Section 92 and the court's "inference" that the omission of Section 92—*i.e.*, its apparent repeal—was the result of forgetfulness. 968 F.2d at 156. But neither of these factors justifies ignoring the literal effect of Congress' action. *See supra* pp. 12-13, *infra* pp. 32-33.

The Court relied on a similar analysis of Congress' use of quotation marks and introductory phrases in *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958). At issue in *Nashville Milk* was whether Section 3 of the Robinson-Patman Act provided a private right of action for treble damages. That question hinged on whether Section 3 was part of the Clayton Act. *Id.* at 376. The Court looked to the text of the Robinson-Patman Act and noted that one provision specifically stated "That Section 2 of the [Clayton Act] . . . *is amended to read as follows*: . . . ." *Id.*, citing the Statutes at Large (emphasis added). The Court observed that "The section then sets forth *in haec verba, and within quotation marks*, all the provisions of § 2, as modified by the amending language." *Id.* (emphasis added). Because Section 3 was *not* included "within the quotation marks" following

the phrase "is amended to read as follows," the Court held that "on its face" Section 3 could not be read as amending the Clayton Act. *Id.* In a companion case, the Court rejected a court of appeals' judgment that the placement of the quotation marks had no significance. *Safeway Stores v. Vance*, 355 U.S. 389 (1958) (reversing 239 F.2d 144, 146 (10th Cir. 1956), in reliance on *Nashville Milk*).

2. *The "Enrolled Bill Doctrine" Precludes This Court From Ignoring the Punctuation Based on Evidence Outside the Statute As Enacted.*

Petitioners urge this Court to pretend that the 1916 Congress had not signified its amendments to Section 5202 with quotation marks. According to petitioners, "there is strong evidence that Congress did not intend the quotation marks in the 1916 Act to have any interpretive effect." Gov't Br. at 20; *see* Bank Br. at 16. Based on earlier permutations of the legislation, petitioners argue, this Court should read the quotation marks out of the 1916 Act. The "enrolled bill doctrine" flatly precludes this Court from doing so.

The enrolled bill approved by the presiding officers of the Senate and House and signed by the President was punctuated as is the Statutes at Large, with quotation marks clearly indicating Section 92's placement within Rev. Stat. § 5202. Gov't Br. at 22 n.9 (examined enrolled bill at the National Archives); Bank Br. at 15. *See* Resp. Ldg. 32-39 (copy of enrolled bill from National Archives).[23] This enrolled bill is the definitive statement of the 1916 Act. It "carries on its face a solemn assurance by the legislative and executive departments of government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by congress." *Marshall Field Co. v. Clark*, 143 U.S. 649, 672 (1892).

> The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable.

Id. Courts are not free to gainsay the enrolled bill's official statement of the contents of the law. "The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated." *Id.; see United States v. Munoz-Flores*, 110 S. Ct. at 1978-79 (Scalia, J., concurring) (invoking enrolled bill doctrine).

The enrolled bill doctrine, as first explicated in *Marshall Field Co. v. Clark*, precludes courts from looking behind the enrolled bill for evidence of what Congress purportedly "intended" to enact. 143 U.S. at 670. Appellants in *Marshall Field*, like petitioners here, argued that legislative documents prior to the bill's enrollment demonstrated that the enrolled bill was incorrect (it allegedly had omitted a section of the statute). The Court did not question appellants' reading of the legislative materials, but found them irrelevant. The Court held that courts cannot look to "journals of either house, . . .

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[23] The Conference Committee's final report as reprinted in House and Senate records and in the Congressional Record also contains punctuation marks as they appear in the enrolled bill and Statutes at Large. *See Journal of the House of Representatives*, 994-95 (1916); *Journal of the Senate*, 625 (1916); 53 Cong. Rec. 13069-70 (1916) (Senate Conf. Rep.); 53 Cong. Rec. 13355 (1916) (House Conf. Rep.).

the reports of committees, or . . . other documents printed by authority of congress" for evidence that an enrolled bill is not what Congress intended to enact. 143 U.S. at 680. Pursuant to the enrolled bill doctrine, "the enrollment itself is the record, which is conclusive as to what the statute is, and cannot be impeached, destroyed, or weakened by the journals of parliament, or any other less authentic or less satisfactory memorials." *Id.* at 675 (internal quotation omitted). *Accord id.* at 674, 676, 677.

Accordingly, this Court must decline petitioners' invitation to rewrite the 1916 Act by eliminating its quotation marks. Principles of separation of powers and finality, which the enrolled bill vindicates, do not permit the Court to look to the legislative history petitioners invoke and conclude that the enrolled bill is wrong. The enrolled bill of the 1916 Act, signed by the leaders of the House and Senate and the President, used quotation marks to set off the "amended" Rev. Stat. § 5202 and included Section 92 within these quotations. This cannot be ignored.

3. *The "Comma Cases" Do Not Support Petitioners' Argument.*

Petitioners' reliance on cases in which courts have held that punctuation should not override the meaning of the words Congress used, where the two conflict, is entirely misplaced. *See* Gov't Br. at 20 and Bank Br. at 15.[24]

[24] *See United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83 (1932) (interpreting meaning of clause using comma so as to avoid constitutional problem); *Crawford v. Burke*, 195 U.S. 176, 192 (1904) (construing the meaning of a comma within text consistent with Congress' traditional usage); *Erie R.R. v. United States*, 240 F. 28, 32 (6th Cir. 1917) (concluding that a comma does not mean "or"). *Ewing v. Burnet*, 36 U.S. (11 Pet.) 41 (1837), is not germane, since the Court merely alluded to punctuation in a jury charge (*not* a statute) without setting out the charge or explaining the problem. *Taylor v. United States*, 495 U.S. 575 (1990), relied upon by the Bank, does not involve punctuation at all.

As an initial point, the *Shreveport* Court's remark that "punctuation marks are no part of an act," 287 U.S. 82, is obviously hyperbole. Punctuation can be a critical element in discerning the meaning of a statutory phrase. *See, e.g., United States v. Ron Pair Enterp., Inc.*, 109 S.Ct. 1026, 1030-31 (1989); *see also Crandon v. United States*, 110 S.Ct. 997, 1007 (1990) (Scalia, J., concurring); *United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979). What the Court has actually found is that, in interpreting statutory text in which the punctuation and words are inconsistent, the punctuation is a less reliable interpretative guide.

The "comma cases" on which petitioners rely differ critically from this case. The comma cases involve confusing language and punctuation. The statutes *as written by Congress* were susceptible of differing interpretations and the court, engaging in routine statutory construction, had to deem one or the other more plausible. Here, by contrast, the statute *as written by Congress* is perfectly clear and capable of only *one* meaning. The quotation marks are not inconsistent with the words. *See infra* pp. 24-25, 27-28. Indeed, the use of bracketing quotation marks to set off an amended section has no bearing on the meaning of the statutory provision; it is directed only toward its placement and is a device uniquely suited to that task.

This case is remarkably similar to *In re Schilling*, 53 F. 81 (2d Cir. 1892), which involved the placement of a parenthesis in the Tariff Act of 1890. It was alleged, based on comments made after the statute's enactment, that Congress had "made a mistake by ending the parenthesis in the wrong place." *Id.* at 83. But the court declined to construe the statute as if the parenthesis was placed where Congress allegedly intended it. Recognizing that punctuation "can be changed in accordance with the obvious intent of the legislature," the court ruled that "curved lines or brackets . . . designate much more distinctly than by use of commas the character of the clause

which is included." *Id.* The court declined to hold that "the declarations of the members of the committees [are] sufficient to authorize a court to change the manifest meaning of a statute as it passed the legislative body and received the approval of the president," concluding that "such a judicial construction of a statute is akin to judicial legislation, which, as congress has refused to act upon the subject, it is well to avoid." *Id.* at 83-84.

Here too, quotation marks clearly "designate . . . the character of the clause to be included" in Rev. Stat. § 5202. Here too, "apart from [the legislative history] . . . it could hardly be claimed that the intent of the statute plainly required a change in the punctuation." *Id.* at 83. And here too, "Congress has refused to act" to "correct" its allegedly mistaken repeal. Petitioners miscast this Court in a legislative role in urging it to ignore Congress' express text.

4. *Even Without the Punctuation Congress Enacted, the Language of the Statute Clearly Places Section 92 in Rev. Stat. § 5202.*

Even without the quotation marks, the language of the remaining text would unambiguously place Section 92 within Rev. Stat. § 5202. Congress used prefatory phrases within the 1916 Act as signposts: they were not intended as positive law, but rather to explain where the 1916 amendments were to be inserted in previously existing law. The introductory phrases appear sequentially in the text of the enrolled bill and Statutes at Large as follows:

> At the end of section eleven insert a new clause as follows: . . .
>
> That section thirteen be, and is hereby, amended to read as follows: . . .
>
> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: . . .

> That subsection (e) of section fourteen, be, and is hereby, amended to read as follows: . . .[25]
>
> • • • •

Section 92 follows the phrase introducing amendments to Rev. Stat. § 5202, and precedes the next prefatory phrase. Congress thereby expressly stated that Section 92 was enacted as part of the amended Rev. Stat. § 5202. The quotation marks, as they appear in the enrolled bill and the Statutes at Large, simply reinforce the meaning of the language of the 1916 Act. It is thus not surprising that this Court concluded in *Posadas v. National City Bank of New York*, 296 U.S. 497 (1936), that the 1916 Act "amends sections . . . of the Federal Reserve Act, *and section 5202 of the Revised Statutes.*" *Id.* at 502 (emphasis added). Petitioners ignore Congress' deliberate use of these introductory phrases.

C. Petitioners' Attempts to Introduce Ambiguity Into the Statutes Is Unavailing.

1. *Petitioners' Reading of the 1916 Act Renders Congress' Actions Meaningless.*

The "sense" petitioners seek to make out of the 1916 and 1918 statutes, in fact, does violence to the express statutory language of the 1916 Act and renders meaningless Congress' actions in 1918. In the 1916 Act, Congress stated, in no uncertain terms, that Rev. Stat. § 5202 "is hereby *amended* . . . ." 39 Stat. 753 (emphasis added). Yet, according to petitioners, Congress did *not* amend Rev. Stat. § 5202, but simply restated § 5202 as it existed pursuant to the 1913 Act. Gov't Br. at 19 n.5; Bank Br. at 21. Petitioners' reading, which ignores the express instruction given by Congress (that Rev. Stat. § 5202 is "amended"), violates the most fundamental tenets of statutory construction. *E.g., Reiter v. Sonotone*

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[25] 39 Stat. 752-754 (Resp. Ldg. 27-29). None of these introductory phrases was enclosed by quotation marks in the enrolled bill or Statutes at Large.

Corp., 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used."); *see also Freytag v. CIR*, 111 S.Ct. 2631, 2638 (1991) (expressing "deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment").

Petitioners contend that in amending Section 13 of the Federal Reserve Act, the 1916 Congress "simply reprinted" the Rev. Stat. § 5202 from the 1913 Act and, inexplicably, included the introductory phrase stating that Rev. Stat. § 5202 "is hereby amended so as to read as follows." But Rev. Stat. § 5202 and the Federal Reserve Act are either separate statutory provisions or they are not. Petitioners seem to concede that they are—certainly no one has ever suggested otherwise. Indeed, Rev. Stat. § 5202 was part of the National Bank Act. Because they are separate and distinct, there was no need for the 1916 Congress to *restate* Rev. Stat. § 5202, *completely unchanged*, in order to amend only Section 13 of the Federal Reserve Act; it could have simply amended Section 13 without mentioning Rev. Stat. § 5202.

Petitioners' reading would also render the 1918 Congress' attempt to amend Rev. Stat. § 5202 a meaningless gesture. In the 1918 Act, Congress amended *only* Rev. Stat. § 5202—a statutory provision separate and distinct from the Federal Reserve Act—by adding an additional exemption. Under petitioners' theory, however, a provision identical to the earlier Rev. Stat. § 5202 would have remained imbedded in Section 13 of the Federal Reserve Act, which the 1918 Congress did *not* amend. The result of petitioners theory would be two different, and conflicting, versions of the text of Rev. Stat. § 5202.

The text of the 1916 Act expressly amended Rev. Stat. § 5202, as this Court concluded in *Posadas*. 296 U.S. at 502. It did not simply restate Section 5202 as it appeared in the 1913 Act. And as the text also shows, Section 92 was unquestionably included in the 1916 amendment.

2. *The Phrase "this Act" Does Not Necessitate Section 92's Placement in Section 13 of the Federal Reserve Act.*

Having ignored Congress' use of quotation marks and introductory phrases, petitioners seek to create textual ambiguity by focusing on Congress' use of the phrase "this Act" in the paragraph *preceding* Section 92 in the 1916 Act to refer to the Federal Reserve Act. *See* 39 Stat. 753 (Resp. Ldg. 28). Even if true, this argument proves little.[26] The meaning of "this Act" has no significance as to whether Section 92 was made part of Rev. Stat. § 5202 or part of Section 13 of the Federal Reserve Act.

It is not necessary that the paragraph preceding Section 92 be placed in Section 13 of the Federal Reserve Act, rather than in Rev. Stat. § 5202, in order for the use of the phrase "this Act" to make sense. If the paragraph preceding Section 92 was inserted in Rev. Stat. § 5202 (as it was), "this Act" would mean the Federal Reserve Act because the paragraph immediately before it explicitly identifies "the Federal reserve Act." *Id.* No other Act of Congress is mentioned, and Rev. Stat. § 5202 is not itself an "Act." Consequently, "this Act" could only refer to the previously identified Federal Reserve Act.[27] Petitioners do not dispute that this is the natural reading of the usage.

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[26] The paragraph preceding Section 92 in the 1916 Act grants the Federal Reserve Board authority to regulate the "discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances *authorized by this Act.*" 39 Stat. 753 (Resp. Ldg. 28) (emphasis added). The discount and rediscount authority was first granted in the second and third paragraphs of Section 13 of the 1913 Federal Reserve Act, 38 Stat. 263-64 (Resp. Ldg. 13-14), and was revised in the second and fourth paragraphs of Section 13 of the 1916 Act, 39 Stat. 752 (Resp. Ldg. 27).

[27] *See* Webster's Ninth New Collegiate Dictionary 1227 (ed. 1988) ("This" means "the . . . thing, or idea . . . that has just been mentioned.").

Whether the paragraph in question was to be located in Rev. Stat. § 5202 or in Section 13 of the Federal Reserve Act, "this Act" would mean "the Federal Reserve Act." Thus, the phrase "this Act" has no bearing on the placement of the paragraph preceding Section 92 or Section 92 itself.[28]

3. *The Title of the 1916 Act Does Not Demonstrate That Section 92 Was Placed in Section 13 of the Federal Reserve Act.*

Petitioners also seek to use the title of the 1916 Act to create ambiguity, because the title did not specifically mention that Rev. Stat. § 5202 was being amended.[29] But "it is well settled that the heading of a statute, or section thereof, may not be used to create an ambiguity or to extend or restrict the language contained in the body of the statute itself." *Bersio v. United States*, 124 F.2d 310, 314 (4th Cir. 1941) (emphasis added), *cert. denied*, 316 U.S. 665 (1942). As the Supreme Court explained the year the 1916 Act was enacted:

> [W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designated names or reports accompanying their introduction, or from any extraneous source.

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[28] Thus, it is irrelevant to the issue at hand that, in other sections of the 1916 Act, Congress similarly used the phrase "this Act" to refer to the Federal Reserve Act. *See* 92-507 Pet. App. 83a (paragraph beginning "'(m)'"), 84a (first full paragraph); Gov't Br. at 17 n.4; Bank Br. at 12-13. Those other usages lend support to the reading of "this Act" in the paragraph preceding Section 92 as referring to the Federal Reserve Act, but that is not at issue. The question is whether the reference evidences whether Section 92 was placed in Rev. Stat. § 5202 or Section 13 of the Federal Reserve Act, which it does not.

[29] The title is "An Act To amend certain sections of the Act entitled 'Federal reserve Act,' approved December twenty-third, nineteen hundred and thirteen." 39 Stat. 752 (Resp. Ldg. 27).

Caminetti v. United States, 242 U.S. 470, 490 (1916). The "detailed provisions" of the 1916 Act demonstrate that Congress enacted Section 92 as an amendment to Rev. Stat. § 5202. The title of the 1916 Act cannot override the text. *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947).

In any event, the title of the 1916 Act is uninstructive. Failing to mention an amendment in a title was not an uncommon practice. Indeed, the titles of the 1913 and 1918 Acts did not mention that they were each making amendments to Rev. Stat. § 5202, although it is undisputed that each Act effected such an amendment.[30] As this Court has explained, "[t]hat the heading of [a statute] fails to refer to all the matters which the framers of that section wrote into the text is not an unusual fact." *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. at 528.[31]

4. *The Subject Matter of the Statutes Involved Is Consistent With Section 92's Placement in Rev. Stat. § 5202.*

Finally, petitioners leave the language used by Congress entirely for a foray into the "substance" of federal banking law. They suggest that Congress must have intended to place Section 92 in Section 13 of the Federal Reserve Act because, according to petitioners, there was no reason to put it in Rev. Stat. § 5202. But asserting

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[30] *See* 38 Stat. 251 (Resp. Ldg. 1); 40 Stat. 506 (Resp. Ldg. 53). As the 1913 and 1918 Acts demonstrate, the federal petitioners are wrong that "the practice of the day was to make such a specification [that the statute was amending a provision of the Revised Statutes] if an amendment to the Revised Statutes was contained in the body of the statute." Gov't Br. at 12.

[31] Moreover, the title of the 1916 Act did encompass amendments to Rev. Stat. § 5202. The title declares that the 1916 Act amends the 1913 Federal Reserve Act. *See* 39 Stat. 752 (Resp. Ldg. 27). The 1913 Act included a fully revised Rev. Stat. § 5202. Thus, amendments to the 1913 Act might well include an amendment to Rev. Stat. § 5202, and did.

the negative does not prove the affirmative. Petitioners advance no reason why Section 92 would have been more appropriately inserted in Section 13 of the Federal Reserve Act. There is no obvious relationship between the two provisions. To the contrary, Section 92 concerned insurance agency and real estate brokerage powers of "national bank associations," whereas Section 13 dealt with the traditional banking powers of "federal reserve banks" (which were different and distinct entities from national banks). Thus, contrary to petitioners' contention, the "subject matter of the banking statutes at issue" does *not* demonstrate that "Section 92 initially belonged in [Section 13 of] the Federal Reserve Act." Bank Br. at 19; *see* Gov't Br. at 19-20.[32]

Indeed, the opposite conclusion is more likely. Rev. Stat. § 5202 was codified as part of the National Bank Act. *See supra* n.19. The National Bank Act is the primary statute defining and limiting the powers of national banks. Thus, not surprisingly, then-Comptroller Williams specifically proposed Section 92 as an amendment to the National Bank Act. The 1916 Congress implemented the Comptroller's recommendation, without discussion, debate, or significant change. *See supra* p. 3 & n.4. No one disputes that Section 92, if it still exists, exists as part of

[32] The Bank speculates that "[a]s Congress was creating entirely new authority for national banks by enacting Section 92, it would have decided that amendment of an existing section of the Revised Statutes was impracticable." Bank Br. at 22 n.26. However, the Bank has no explanation as to why Congress would have thought it more "practicable" to amend an existing section of the Federal Reserve Act that not even petitioners contend had anything to do with the subject matter of Section 92. What might have been most "practicable" would have been to create an entirely new and separate statutory provision, but no one contends Congress did so. The Bank suggests that the 1916 Congress would naturally use the existing legislative vehicle of the Federal Reserve Act, amendments to which it was considering when the Comptroller made his suggestion. Bank Br. at 22. But that simply begs the question. Congress obviously inserted Section 92 in the 1916 Act; the issue is whether that Act amended Rev. Stat. § 5202 as well as the 1913 Federal Reserve Act.

the National Bank Act. Thus, if any inference is to be drawn from the "substance" of the 1916 Act, it is that Section 92 was an amendment to Rev. Stat. § 5202.

D. No Extrinsic Evidence Negates the Conclusion Necessarily Drawn From the Text of the Enrolled Bill and Statutes at Large: Congress Repealed Section 92 in 1918.

This Court has explained that "[g]oing behind the plain language of a statute in search of a possibly contrary Congressional intent is 'a step to be taken cautiously even under the best of circumstances.'" *United States v. Locke*, 471 U.S. 84, 95 (1985), *quoting American Tobacco Co. v. Patterson*, 456 U.S. 63, 75 (1982). *See, e.g., Connecticut Nat'l Bank v. Germain*, 112 S.Ct. 1146, 1149 (1992); *Freytag v. CIR*, 111 S.Ct. at 2636; *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). At most, this Court should examine whether there is *clearly expressed* legislative intent to the contrary. Only if a "literal application of a statute will produce a result *demonstrably at odds* with the intentions of its drafters" should a court rely on its view of the drafters' intent. *Griffin*, 458 U.S. at 571 (emphasis added); *accord, e.g., Union Bank v. Wolas*, 112 S.Ct. 527, 530 (1991); *Ardestani v. INS*, 112 S.Ct. 515, 520 (1991); *Demarest v. Manspeaker*, 111 S.Ct. 599, 604 (1991); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). This is an extremely heavy burden. Legislative silence cannot satisfy the burden, nor can snippets of legislative history that do not mandate an interpretation contrary to the language Congress enacted. Subsequent actions of regulators and legislators are of negligible or no weight.

Petitioners have not met their burden here. As in *Ullman v. United States*, "[t]he most that can be said for the legislative history is that it is on the whole inconclusive. Certainly, it contains nothing that requires the court to reject the construction which the statutory language clearly requires." 350 U.S. 422, 433 (1956). Noth-

ing in the extraneous evidence on which petitioners rely demonstrates a congressional intent inconsistent with the text of the 1916 and 1918 Acts.

1. *Congressional Silence Cannot Demonstrate an Affirmative Intention Not to Repeal Section 92.*

There is no relevant express statement of Congress' intent anywhere in the legislative history. The only mention of the placement of Section 92 is Comptroller Williams' recommendation that it be added as an amendment to the National Bank Act, of which Rev. Stat. § 5202 was a part, 53 Cong. Rec. 11001 (1916), and Senator Owen's proposal that Section 92 be inserted in the bill that became the 1916 Act after the introductory clause indicating an amendment to Rev. Stat. § 5202, *id.* at 11153. Both support a literal reading of the text. The 1918 Act's legislative history is utterly silent regarding Congress' intention to preserve or repeal Section 92.

Lacking any clear statement of congressional intent, petitioners are reduced to the untenable argument that what a later Congress did *not* say demonstrates what an earlier Congress meant to do. According to petitioners, the 1918 Congress' failure to state why it believed Section 92 should be repealed proves that *the 1916 Congress* did not intend to place Section 92 in Rev. Stat. § 5202. *See* Gov't Br. at 23-26; Bank Br. at 25. If the expressed views of a later Congress "form a hazardous basis for inferring the intent of an earlier one," *Russello v. United States*, 464 U.S. 16, 26 (1983), the silence of a later Congress forms no basis at all.

Petitioners' attempt to create ambiguity in the 1916 statute by pointing to silence in the legislative history of the 1918 Act "read[s] much into nothing." *Albernaz v. United States*, 450 U.S. 333, 342 (1981). As this Court has instructed, "[o]rdinarily, 'Congress' silence is just that—silence.'" *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 749 (1989), quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). Congress does not have an affirmative duty to explain to the Court

why it deems a particular enactment wise or necessary, or to demonstrate that it is aware of the consequences of its action:

> [I]t would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the face of a statute. In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.

Harrison v. PPG Indus. Inc., 446 U.S. 578, 592 (1980); *accord, e.g., Albernaz*, 450 U.S. at 341.[33]

2. *Subsequent Actions by Congress, the Comptroller and the Courts Cannot Revive a Repealed Statute.*

Petitioners agree that the subsequent actions of Congress, the courts, the Comptroller and the Federal Reserve Board "cannot revive a statute whose text clearly indicates its repeal." Gov't Br. at 31; *see* Bank Br. at 26. That is the end of the matter, for, as demonstrated above, the text of the enrolled bill and Statutes at Large clearly indicates that Section 92 has been repealed.

a. Nevertheless, petitioners argue that there is ambiguity and that the best guide to resolving that ambiguity is the agencies' contemporaneous construction of the statute. Gov't Br. at 31-32; Bank Br. at 26. Even assuming ambiguity exists here—and it does not—the evidence petitioners muster does not lead to the conclusion that Section 92 still exists.

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[33] Petitioners observe that neither Senator Owen nor Comptroller Williams complained that the 1918 Act would repeal Section 92. But Congress barely discussed Section 92 when it was enacted in 1916. Senator Owen simply explained that he had altered the Comptroller's recommendation from a town of less than 3,000 to a town of less than 5,000, at the behest of another Senator, and said that "[t]he matter is unimportant either way." 53 Cong. Rec. 11153 (1916). Thus, Congress does not appear to have been concerned one way or the other with the authority of national banks to sell insurance in small towns.

As an initial matter, there is no support for deferring to the views of the Comptroller or Federal Reserve Board as to Section 92's placement or repeal.[34] This Court has never held that an agency's view of whether Congress enacted or repealed a statutory provision is entitled to deference. It is one thing to defer to an agency's view on how a particular statute that it administers should be interpreted or applied when there is a gap or ambiguity in existing statutory language. After all, the agency presumably has particular expertise regarding the workings of that regulatory arena and constitutional authority to execute the laws Congress enacts. *See e.g., Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Bureau of Alcohol, Tobacco & Firearms v. FLRB*, 464 U.S. 89, 97-98 & n.8 (1983); *Ford Motor Credit Co. v. Mihollin*, 444 U.S. 555, 556 & n.9 (1980). However, no agency expertise comes into play in judging whether Congress did or did not repeal a statutory provision.[35] That judgment is assigned by the Constitution to the judiciary. To defer to agencies in this context would be to grant them power not contemplated by the Constitution. *See Dixon v. United States*, 381 U.S. 68, 74 (1965).

In any event, the "contemporaneous" view of the Comptroller, who was charged with implementing Section 92,

[34] In any event, an agency's interpretation of a statute receives no deference where, as here, it is at odds with the statute's plain text. *E.g., Demarest v. Manspeaker*, 111 S.Ct. 599, 603 (1991); *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 2854, 2863 (1989) ("no deference is due to agency interpretations at odds with the plain language of the statute itself [e]ven [if] contemporaneous and longstanding"); *SEC v. Sloan*, 436 U.S. 103, 117 (1978) (no deference even if interpretation "has been both consistent and longstanding").

[35] *Compare Bankamerica Corp. v. United States*, 462 U.S. 122 (1983) (agency's apparent interpretation of substantive provision of Clayton Act). If any "agency"-like body is entitled to deference in this context based on its expertise, it is the Office of the Law Revision Counsel, which in assembling the U.S. Code, determined that Section 92 has been repealed.

was that the 1916 Act made Section 92 a part of Rev. Stat. § 5202—not a part of the Federal Reserve Act. The Comptroller's 1917 compilation of federal laws pertaining to national banks located Section 92 as part of Rev. Stat. § 5202, with marginal notes indicating that Section 92 had been added to Rev. Stat. § 5202 by the 1916 Act. *See* S. Doc. No. 412, 64th Cong., 1st Sess. 83 (1917) (Resp. Ldg. 50).[36] *See also* S. Doc. 216, 66th Cong., 2d Sess. 7 (1920) (post-1918 Act Comptroller compilation describing the 1916 Act as amending Rev. Stat. § 5202). Thus contemporaneous agency views support the conclusion that Congress enacted Section 92 as an amendment to Rev. Stat. § 5202.[37] Publication of this compilation by

[36] The Comptroller's additional printing of 5202 elsewhere in the compilation is fully consistent with Section 92's placement within Rev. Stat. § 5202. In the section of the compilation setting out the Federal Reserve Act, the Comptroller included, as a separately headed section, the full text of Rev. Stat. § 5202 (including Section 92) as it was stated in the 1916 Act. That is, the section begins by stating "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows." *Id.* at 136-137 (Section 613c) (Resp. Ldg. 52). What follows includes Section 92. The natural reading is as stating the entirety of the newly amended Rev. Stat. § 5202 (which was created by the 1916 Act)—an understanding confirmed by looking to the separate section of the compilation that printed the amended Rev. Stat. § 5202 to include Section 92, but without the introductory phrase. *Id.* at 83 (Resp. Ldg. 50). No matter which section of the Comptroller compilation a member of Congress consulted, Section 92 appeared as a part of Rev. Stat. § 5202.

In its report covering operations for the year 1916, the Federal Reserve Board simply set out the full text of the 1916 Act, offering no indication as to whether it believed Section 92 was part of an amendment to Rev. Stat. § 5202 or not. "Third Annual Report of the Federal Reserve Board," at 134-139 (1917). *See also* Federal Res. Bd., *The Federal Reserve Act As Amended* 27-28 (1917) (setting out 1916 Act as it appears in Statutes at Large, including quotation marks). That text, as demonstrated above, shows that Section 92 was enacted as an amendment to Rev. Stat. § 5202.

[37] The fact that the Comptroller has since issued regulations implementing Section 92 does not attest to the agency's authority to do so. *See Adamo Wrecking Co. v. United States*, 434 U.S. 275,

the Senate Committee on Banking and Currency further supports the inference that Congress (or at least the committee that oversaw banking issues) believed the same.

It is this document to which the federal petitioners claim an interested member of the 1918 Congress would have turned in assessing the impact of the 1918 Act. *See* Gov't Br. at 27-28. Whether a member would have consulted anything other than the Statutes at Large is unclear. But since the Comptroller compilation, like the two privately published services to which the court of appeals referred,[38] clearly placed Section 92 within Rev. Stat. § 5202, those members who consulted it would logically have assumed that Section 92 would be repealed by the 1918 Act.[39]

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287 n.5 (1978) (Powell, J., concurring). Agency actions have only such effect as Congress gives them. Agencies do not have the power to make law, only to adopt regulations that carry out the law. *SEC v. Sloan*, 436 U.S. at 117-119; *Dixon v. United States*, 382 U.S. 68, 73-74 (1965). The existence of prior administrative practice, even if longstanding and well-explained, does not relieve the court of the responsibility to determine independently whether the practice is consistent with the Acts of Congress. *Sloan*, 436 U.S. at 118-119.

[38] *See* 9 U.S. Comp. Stat. Ann. § 9764 (West 1916) (Resp. Ldg. 40-43); 3 U.S. Stat. Ann. § 5202 (T.H. Flood & Co. 1916) (Resp. Ldg. 44-48). Every extant source of law showed Section 92 as an amendment to Rev. Stat. § 5202.

[39] The drafters of the 1916 Act could not have assumed on the basis of the Comptroller compilation that Section 92 would continue in existence however Rev. Stat. § 5202 was amended. *See* Gov't Br. at 28. As explained above, *supra* p. 26, if Congress had relied on the Comptroller compilation as petitioners understand that document—that is, as including Section 5202 as a subpart of Section 13 of the Federal Reserve Act (as opposed to a separate and distinct statutory provision)—Congress would have been impelled to amend both Section 5202 *and* the Federal Reserve Act in 1918 (which it did not do). The Comptroller compilation published after the 1918 Act demonstrates this point. The document shows Rev. Stat. § 5202 as stated in the 1918 Act—removing Section 92. *See* S. Doc. 216, 66th Cong., 2d Sess. 83 (1920). Recognizing that the 1918 Act did not amend Section 13 of the Federal Reserve Act, the compilation does not print the 1918 added exemption within Section 13, but instead drops a footnote referring to the 1918 Act. *Id.* at 146 & n.2.

b. Courts have no greater power than agencies to reenact a repealed statute. In any event, contrary to the Bank's assertion, there has been no "judicial position regarding the validity of Section 92." Bank Br. at 31. The D.C. Circuit was the first court to squarely address and resolve whether Section 92 exists. Other courts, including this Court, had, at most, noted Section 92's absence from the U.S. Code, but simply "assumed" its existence. *See, e.g., Commissioner of Internal Revenue v. First Sec. Bank*, 405 U.S. 394, 401-02 & n.12 (1972); *First Nat'l Bank v. Smith*, 610 F.2d 1258, 1261 & n.6 (5th Cir. 1980); *Commissioner of Internal Revenue v. Morris Trust*, 367 F.2d 794, 795 n.3 (4th Cir. 1966).

In *First Security Bank*, for instance, the Court considered whether the IRS could allocate insurance income (under 26 U.S.C. § 482) from subsidiaries to the national banks that controlled them. The Court held that the banks, who claimed they believed that Section 92 forbade them to earn income from the sale of insurance, were not free to shift this income and therefore the IRS could not allocate it to them. The Court did not interpret Section 92. In fact, the Court made clear that it was *not* addressing Section 92's effect. The Court explicitly noted the controversy over the existence of Section 92. *Id.* at 401 n.12. However, the Court concluded that, given the banks' position, it would simply "[*a*]*ssume for purposes of* [*its*] *decision* that the Banks were prohibited from receiving insurance-related income." *Id.* at 402 (emphasis added).[40] Justices Blackmun and White, dissenting

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[40] The Bank misleadingly suggests that the Court deferred to the Comptroller's view that Section 92 continues to exist. *See* Bank Br. at 30, citing *First Security*, 405 U.S. at 403 n.16. The Court did nothing of the kind. In the cited footnote, the Court deferred to the Comptroller's interpretation of federal law generally as permitting national banks to make credit insurance available to their customers. The discussion had no relation to Section 92.

from the interpretation of 26 U.S.C. § 482, expressed the view that whether Section 92 "is still in effect [is] a proposition which may not be free from doubt." *Id.* at 418 (Blackmun, J., dissenting). *See also id.* at 419, 426 (referring to "the missing § 92").

c. The apparent assumption of Congresses in the 1980's, by purporting to amend or suspend Section 92, that the statutory provision had not been repealed, provides no support for petitioners' argument.[41] The views of a subsequent Congress are of "very little, if any, significance" in interpreting legislation enacted by an earlier Congress. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968). *Accord, e.g., Consumer Prod. Safety Comm'n*, 447 U.S. at 117-18; *United States v. Price*, 361 U.S. 304, 312 (1960); *United States v. United Mine Workers*, 330 U.S. 258, 282 (1947). But "all courts hold that a repealed act cannot be amended. No court will give the attempted amendment the effect of reviving the repealed act." 1A N. Sand, Sutherland Statutory Construction § 22.03 at 173 (4th ed. 1985).

Subsequent legislatures cannot breathe life into a nonexistent statute retroactively; at most, they can give it vitality as a new act by positively re-enacting it. *Town of South Ottawa v. Perkins*, 94 U.S. 260, 269-70 (1877). But here, as in *Perkins*, the Legislature did not profess to do so.[42] The Court's ruling in *Perkins* is on point:

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[41] *See* Garn-St Germain Depository Institution Act of 1918, Pub. L. No. 97-320, § 403(b), 96 Stat. 1510-11 (purporting to amend Section 92 by striking the non-insurance agency portion of the provision); Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 583 (purporting to place a moratorium on Section 92 insurance activities).

[42] No one suggests that the 1980s laws, *see supra* n.41, re-enacted Section 92. *See, e.g.*, S. Rep. No. 536, 97th Cong., 2d Sess. 60, *reprinted in* 1982 U.S. Code Cong. & Admin. News 3054, 3114 (explaining that Garn-St Germain Act Depository Institutions Act of 1982 simply "deletes the existing reference [in Section 92] to the authority of national banks . . .").

> The most that can be said is that in referring to the [earlier Act], the Legislature inadvertently supposed that it [was valid]. Whether such inadvertence was the result of a false suggestion, by interested parties or otherwise, is of no consequence. . . . To give to such a reference in a subsequent Act, as is here relied upon, the effect of validating or reviving or vitalizing a void or repealed statute, when no such intention is expressed, would be dangerous and would lay the foundation for evil practices.

Id. at 270. *See also United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348-49 (1963) (construction of Section 7 of the Clayton Act not foreclosed by fact that Congress' misunderstanding of its scope may have played some part in passage of Bank Merger Act).

d. Furthermore, subsequent actions of the Congress and the courts have not been "utterly inconsistent" with the conclusion of repeal. Gov't Br. at 29. The construction of the 1916 and 1918 Acts has been far from "uniform." Bank Br. at 26.

During the late 1950's the issue of Section 92's repeal was the subject of considerable debate in Congress, especially during the House's consideration of a bill that would have treated Section 92 as existing law. In 1957, Congressman Patman, a member (and future Chairman) of the House Banking Committee, argued forcefully that Section 92 had been repealed. *House Hearings* at 989-90, 1060-63. Congressman Cellar, Chairman of the House Judiciary Committee, supported by counsel for the Subcommittee on Revision and Codification of the Laws, agreed. Relying on the plain meaning of the text of the 1916 and 1918 Acts, Celler testified that "[i]t is clearly indicated that [Section 92] has been repealed. There is no question about it." *Id.* at 1501. Celler rejected the arguments now reiterated by petitioners here:

> An unambiguous enactment is the law. The United States Code is prima facie evidence of what the law

> is. The various contentions that have been made, to the effect that [Section 92] was never repealed, all run afoul of these unassailable principles. More than mere doubt and conjecture are required to overcome the force of law, or to overcome the official prima facie statement of it.

Id. at 1503. This dispute also prompted submissions by the Comptroller, counsel for the House Banking Committee, counsel for the Advisory Committee for the Study of Federal Statutes Governing Financial Institutions and Credits, and the Library of Congress's Legislative Reference Service. *Id.* at 1010-25, 1036-40, 1063-71.[43] After receiving these views, the House Committee on Banking offered no formal judgment on Section 92's validity. *See, e.g., id.* at 1090, 1199 (comments of Sen. Betts, expressing view that no one on committee can say "that it is or is not the law"; comments on Sen. Patman, expressing view that "it is not the law"). And the provision that would have treated Section 92 as existing law was not enacted.

Seven years later, however, the staff of a House Banking subcommittee reached the conclusion that "Section 92 is non-existent."[44] And in 1988, the Senate passed a bill amending the National Bank Act and including a *new* section that would have duplicated Section 92 (if it had existed) with more explicit limitations. But the bill made no reference to Section 92 or provision for its amendment, replacement or repeal, thus suggesting the view

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[43] The latter memorandum took no position as to the existence of Section 92, but rather "attempt[ed], under a very short deadline, to state the pertinent facts." *Id.* at 1063. The other submissions echoed the arguments made by petitioners here.

[44] *Consolidation of Bank Examining and Supervisory Functions, 1965: Hearings on H.R. 107 and H.R. 6885 before the Comm. on Banking and Currency of the House of Representatives, Subcomm. on Bank Supervision and Insurance*, 89th Cong., 1st Sess. 3, 391 (1965).

that Section 92 was not in effect.[45] The bill was not enacted. No post-1918 Congress has re-enacted Section 92.

e. The Bank's complaint that the banking community has relied upon Section 92's existence for decades is beside the point. *See* Bank Br. at 31. As Judge Sentelle correctly observed:

> The passage of time, the acquiescence of the parties, the assumptions of officials, even all taken together cannot enact a statute. Legislation only comes into existence through bicameral congressional enactment and presentment to the President of the United States. . . .

92-507 Pet. App. 37a (concurring in denial of rehearing *en banc*). And whatever reliance the banks have placed has been in the face of Section 92's omission from the U.S. Code for more than 40 years, repeated questions about Section 92's continued existence, and the absence of any court ruling resolving the issue. This Court can serve the banks' purported commercial reliance interests only by judicially re-enacting Section 92. And no reliance interest, however strong, can justify the Court's assumption of legislative power.

II. THE COURT OF APPEALS PROPERLY EXERCISED ITS DISCRETION IN DETERMINING THE VALIDITY OF SECTION 92.

The court of appeals plainly had the authority to decide whether Section 92 exists. The federal petitioners concede that the court was not "powerless to resolve the question [of Section 92's validity] if it chose to do so" and may not even "have had the *discretion* to refuse" to decide it. Gov't Br. at 14 n.3 (emphasis in original). They recognize that the court's application of the law governing the controversy before it—even though its analysis of that law differed from that offered by any

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[45] The Proxmire Financial Modernization Act of 1988, Section 513B, reprinted in 134 Cong. Rec. S3541 (1988).

party—was fully consistent with the standards established by this Court. *See id.* A contrary position would leave federal courts in an untenable position: parties could preclude a court from deciding a claim on the correct legal grounds by insisting that the court resolve the claim on grounds more favorable to the parties' overall interests. The federal courts are not captive to such manipulation.

The Bank premises its disagreement on two representations: that the D.C. Circuit's resolution of the validity of Section 92 was an improper advisory opinion, and that the validity of Section 92 was a separate claim that respondents had affirmatively waived. Bank Br. at 31-35. Neither characterization is apposite.

A. The Court of Appeals Decided A Concrete Case or Controversy.

Respondents' suit—a challenge to the Comptroller's power to issue its approval to the Bank—was the "pursuance of an honest and actual antagonistic assertion of rights by one [party] against another." *Muskrat v. United States*, 219 U.S. 346, 359 (1911). Respondents brought the suit to enforce law that limits national banks' sale of insurance. Petitioners defended the suit so that national banks might be permitted to engage in this commercial undertaking. The facts before the court of appeals were not hypothetical and its decision did not just offer advice. The contested agency ruling issued; the economic position of respondents' members was threatened by it; and the decision, if affirmed, will have the concrete effect of forcing the Comptroller to rescind the ruling.[46]

The question decided by the court of appeals thus fits exactly this Court's definition of an Article III case or

[46] *Compare Princeton University v. Schmid*, 455 U.S. 100, 102 (1982) (appellant specified it did not prefer one outcome to another); *Muskrat*, 219 U.S. at 361 (defendant had no interest adverse to the claimants).

controversy. The "valuable legal rights asserted by the [respondents] and threatened with imminent invasion by [petitioners], will be directly affected to a specific and substantial degree by the decision of the question of law." *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249, 262 (1933). In *Nashville*, this Court held that the case before it was not an attempt to secure an advisory opinion because the decision would determine the appellant's duty to pay tax. *Id.* Likewise, the court of appeal's decision that Section 92 was repealed determined the Comptroller's power to issue the approval given the Bank, and the Bank's ability to rely on that approval in venturing into a new business. Accordingly, there was no Article III bar to the court of appeals' decision.[47]

B. The Court of Appeals Decided A Claim That Was Already Before It.

The invalidity of Section 92 is not a discrete and unasserted claim, as the Bank contends, but a question "antecedent to . . . and ultimately dispositive of" the claim squarely presented by respondents. *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990). Respondents' claim was that the Comptroller violated Section 702(2)(A) of the Administrative Procedure Act in issuing an approval not authorized by Section 92, the sole

[47] The Bank's reliance on *Williams v. Zbaraz*, 448 U.S. 358 (1980), is misplaced. Contrary to the Bank's representations, *see* Bank Br. at 34, *Zbaraz* did not even suggest that the parties' failure to challenge a federal statute as invalid precludes federal courts from considering the question. *Zbaraz* held that a federal court granting all the relief asked for, by striking down a state statute as unconstitutional, has no cause to ransack through the statute books to find other provisions that would succumb to the same constitutional defect if challenged. *Id.* at 367. The court of appeals' resolution of the validity of Section 92 was not the result of a foraging expedition. The parties had asked the court to construe Section 92. The court justifiably chose to ascertain whether the statute existed before expending judicial resources on its interpretation.

authority on which the Comptroller relied.[48] Respondents thus "effectively invoked" Section 702(2)(A) "as the basis of [their] right to" have the unauthorized ruling rescinded, and the case was decided on that basis. *See Kamen v. Kemper Financial Services, Inc.*, 111 S. Ct. 1711, 1718 (1991).

In deciding respondents' claim, however, the court of appeals analyzed Section 92's inadequacy as the Comptroller's source of power differently than had respondents, just as this Court in *Kamen* analyzed the applicable federal common law rule differently than had the plaintiff. *See id.* at 1718-1723. Respondents argued that the terms of Section 92 do not permit the Comptroller to issue such a ruling. The court instead found that Section 92 does not authorize the ruling because it no longer exists.

This Court addressed a near-identical situation in *Arcadia*. Although the parties had argued their positions on the basis of specific interpretations of § 318 of the Federal Power Act, this Court unanimously chose to decide the case on the ground that § 318 did not govern the dispute. 111 S. Ct. at 418. No party had made this argument at any point in the proceedings.[49] Nonetheless, the Court, realizing that the inapplicability of § 318 to the agency orders at issue was an alternative argument, rather than a separate claim, *sua sponte* developed an analysis of the law "dispositive of the present dispute." *Id.* Here, the claim before the court of appeals turned on what Section 92 authorized, and the court determined that an analysis of the law not pressed by any party—

[48] *See* NALU *et al.* Complaint, ¶ 19 (Resp. Ldg. 63-64); IIAA, *et al.* Complaint ¶ 19 (Resp. Ldg. 67).

[49] *See Arcadia*, 111 S. Ct. at 418; *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1658 (1991) (Stevens, J., dissenting) (noting that *Arcadia*, was decided "on an issue that not only was not raised below or in any of the papers in this Court, but that also was not raised at any point during oral argument before the Court").

the non-existence of Section 92—was dispositive of this claim.[50]

C. The Court of Appeals Has Discretion to Apply the Law Governing Claims Before It Whether or Not a Party Urges a Correct View of That Law.

Having undertaken to decide whether Section 92 authorized the Comptroller's ruling, the court of appeals was "not limited to the particular legal theories advanced by the parties, but rather retain[ed] the independent power to identify and apply the proper construction of governing law." *Kamen*, 111 S. Ct. at 1718, citing with approval *Lamar v. Micou*, 114 U.S. 218, 223 (1885) ("The law . . . is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof."). The Bank's assertion that respondents' initial failure to argue Section 92's invalidity operates as a waiver or forfeiture of this legal theory has been

[50] In any event, the court of appeals could have addressed the invalidity of Section 92 even if it had been a separate claim. The absence of Section 92 from the U.S. Code established a prima facie case that the section had ceased to exist. *See* 1 U.S.C. § 204(a). Courts "need not render judgment on the basis of a rule of law whose nonexistence is apparent on the face of things, simply because the parties agree upon it." *United States v. Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring); *see also McCormick v. United States*, 111 S. Ct. 1807, 1814 n.6 (1991) (acknowledging the plain error doctrine); *Hormel v. Helvering*, 312 U.S. 552, 556-7 (1941) (upholding an appellate court's decision to enforce a tax based on a tax section not relied upon by the government below because "injustice might otherwise result").

The Bank overstates these doctrines when it suggests that only errors "beyond any doubt" are plain and only extraordinary circumstances constitute "injustice." Bank Br. at 33. The "plain errors" reversed by appellate courts are not undisputed; at the very least, each was considered an accurate decision by the trial judge. Likewise, *Hormel*'s "injustice" was simply an incorrect resolution of the case. The error of the district court's finding that the Comptroller's ruling was authorized by Section 92 met both standards: Section 92 is plainly absent from the U.S. Code, and relying on a non-existent statute to validate agency action is unjust.

rejected by this Court: "There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law . . . is a law or it is not a law, according as the truth of the fact may be, and not according to the shifting circumstances of parties." *Town of South Ottawa v. Perkins*, 94 U.S. at 267. As the *Perkins* Court explained:

> It would be an intolerable state of things if a document purporting to be an Act of the Legislature could thus be a law in one case and for one party, and not a law in another case and for another party; a law to-day, and not a law to-morrow; a law in one place, and not a law in another.

Id. Thus, this Court has long ignored even the express stipulations of parties as to "the legal issues in the present case and those resolved by" precedent. *Sanford's Estate v. IRS*, 308 U.S. 39, 51 (1939).

Decisions of this Court regularly rest on legal theories not propounded by the parties.[51] The tradition of *amicus curiae* in this Court and others is premised on a court's ability and need to look beyond the parties' understanding of the law.[52] In cases where a legal theory this Court finds essential to the decision requires further illumination, the Court has not hesitated to order rebriefing and reargument.[53] A court of appeals has comparable

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[51] *E.g., Kamen*, 111 S. Ct. at 1723 (unanimous); *Arcadia, Ohio*, 111 S. Ct. at 418; *McKesson v. Div. of Alcoholic Beverages & Tobacco*, 110 S. Ct. 2238, 2247-2258 (1990) (unanimous); *Citibank, N.A. v. Wells Fargo Asia Ltd.*, 110 S. Ct. 2034 (1990); *Teague v. Lane*, 109 S. Ct. 1060, 1069 (1989). Separate opinions also not infrequently set forth legal theories pressed by none of the parties. *See, e.g., Burke*, 112 S. Ct. at 1877 (Scalia, J., concurring); *American Trucking Associations, Inc. v. Smith*, 110 S. Ct. 2323, 2343 (1990) (Scalia, J., concurring); *Segura v. United States*, 468 U.S. 796, 805 (1984) (Burger, C.J., joined by O'Connor, J.).

[52] *See, e.g.*, Sup. Ct. R. 37.1, 28.7; Fed. R. App. P. 29.

[53] *E.g., Allied-Signal, Inc. v. Director, Div. of Taxation*, 112 S. Ct. 1461 (1992); *McKesson v. Division of Alcohol Bev. and Tobacco*, 492 U.S. 915 (1989); *Patterson v. McLean Credit Union*, 485 U.S. 617 (1988); *Garcia v. San Antonio Metropolitan Transit Authority*, 468 U.S. 1213 (1984), *New Jersey v. TLO*, 468 U.S. 1214 (1984); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 422 U.S. 1005 (1975); *Benton v. Maryland*, 393 U.S. 994 (1968).

discretion to analyze the law governing cases before it, as its appellate jurisdiction, unlike this Court's, is plenary and mandatory.

Furthermore, the district court's conclusion that Section 92 was "inadvertently repealed in 1918" and its assumption that the repealed statute continued to exist "*in proprio vigore*" (*i.e.*, that the repealed statute might exert force, based on the power of opinion alone), 92-507 Pet. App. 44a-45a, provided ample basis for the court of appeals to exercise its discretion to revisit these questions. At the very least, the court of appeals had the *power* to review these decisions. *See* 28 U.S.C. § 1291.[54] Given the long history of courts alluding to Section 92, the appellate court may even have had a positive duty to avoid "reinforc[ing] error already prevalent in the system." *United States v. Burke*, 112 S. Ct. 1867, 1877 (Scalia, J., concurring).[55]

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[54] *See also Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991) ("the courts of appeals are vested with plenary appellate authority over final decisions of district courts").

[55] The court of appeals' review was strictly limited to the decisions below. The court of appeals upheld the district court's finding that Section 92 was repealed but overturned the district court's judgment that circumstances exist under which a repealed statute can survive through means other than re-enactment, which had not occurred. This Court has frequently exercised its discretionary jurisdiction to decide questions passed on below, but not pressed by the parties. *See, e.g., United States v. Williams*, 112 S. Ct. 1735, 1738, 1739 n.2 (1992); *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991); *Stevens v. Dep't of Treasury*, 111 S. Ct. 1562, 1567 (1991).

D. The Court of Appeals Exercised Its Discretion Wisely.

Few lawsuits present as compelling a case for the exercise of appellate discretion to consider a legal analysis not pressed by the parties. The court of appeals was asked to construe a "statute [that] may not exist," a dubious alternative under established notions of the judicial function and judicial legitimacy. *See McCormick v. United States*, 111 S. Ct. 1807, 1820 (1991). If, as the court suspected, the statute does not exist, the court risked issuing a decision that was not only wrong but fanciful. In contrast, by deciding the validity of Section 92, the court strove to resolve the case in a manner consistent with existing law and standards of judicial economy.[56] As the federal petitioners acknowledge, it is "entirely proper for [a] court to decline to construe" a statute that has been repealed. Gov't Br. at 14 n.3.

The court of appeals undertook the analysis and resolution of the status of Section 92 fairly and carefully. In no sense could the "losing party claim to have been ambushed." *United States v. Williams*, 112 S. Ct. at 1739 n.2. Petitioners had "an opportunity to be heard" and "the opportunity to offer all the evidence they believe relevant to the issues." *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976). Furthermore, the issue under consideration by the court of appeals was a pure question of law, which appellate courts have long been recognized as well-situated to review *de novo*. *See, e.g.*, 5 U.S.C. § 706; *Salve Regina College*, 111 S. Ct. at 1221. The inquiry required no consideration of testimony or evidence, over

[56] Most of the parties affected by the decision on the Comptroller's ruling were already before the court either as parties or *amici*: the Comptroller and the major associations representing the banking and insurance-agency industries. The American Bankers Association, a trade association purporting to represent national and state-chartered banks in all fifty States and the District of Columbia, participated in the appeal as *amicus curiae*.

which district courts are given primary responsibility, nor even the application of law to facts. Empowered to consider the validity of law it was asked to construe, the court's exercise of that discretion was appropriate, fair, and circumspect.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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March 1993

Nos. 92-484 and 92-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

STEPHEN L. STEINBRINK, ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioners

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., *et al.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER UNITED STATES NATIONAL BANK OF OREGON

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REPLY BRIEF FOR PETITIONER UNITED STATES NATIONAL BANK OF OREGON

This case principally presents an issue of statutory construction, namely, whether Congress enacted Section 92 in 1916 as an amendment to the Federal Reserve Act or as an amendment to Section 5202 of the Revised Statutes. All the parties before the Court agree that the answer to that question resolves whether Section 92 remains in force.[1]

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[1] *See, e.g.*, U.S. Br. 14-18; Pet. Br. 11-15; Resp. Br. 14-20; *see also* American Bankers Association Br. 4-20.

In our opening brief, we pointed out that the court of appeals invalidated Section 92 based on the placement of quotation marks in the original provision, the Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753. *See* Pet. App. 7a-8a, 67a-72a.[2] In the court's view, this punctuation reflected Congress's intention to make that provision part of Section 5202 of the Revised Statutes, which Congress amended in 1918 without including the language of Section 92 enacted in 1916. We then explained that the court's analysis of the quotation marks was mistaken. All the available evidence—the language, structure, and subject matter of the statute—demonstrates that Congress enacted Section 92 as an amendment to the Federal Reserve Act and did not repeal Section 92 in 1918 when it amended Section 5202 by the War Finance Corporation Act. *See* Pet. Br. 11-31; *accord* U.S. Br. 14-32.

Despite the length of their submission, respondents principally defend the court of appeals' judgment on the proposition that the punctuation contained in the text of the enrolled bill and the Statutes at Large is decisive. *See* Resp. Br. 8, 14-22. Respondents also latch onto Congress's use of the prefatory phrase in the 1916 Act that Section 5202 "'is hereby amended so as to read as follows.'" Resp. Br. 17 (quoting 39 Stat. 753). Respondents thus chastise petitioners for asking the Court both to "ignore the punctuation Congress chose" and "Congress' express statement in the 1916 Act that it was *amending* Rev. Stat. § 5202." Resp. Br. 9 (emphasis in original).[3]

[2] "Pet. App." refers to the appendix to the petition filed in No. 92-484.

[3] Such criticism is wide of the mark. First, there is affirmative evidence—all of which respondents ignore—that the drafters of Section 92 did not intend the quotation marks to have any interpretive significance. *See* Pet. Br. 16-19; U.S. Br. 20-22. Second, Congress did not amend Section 5202 in 1916—in amending Section 13 of the Federal Reserve Act at that time, Congress merely restated verbatim a portion of the 1913 Act that had previously referred to amending Section 5202. *See* Pet. Br. 14-15, 21-22; U.S. Br. 18-19.

As shown below, this Court's precedents, well-established principles of statutory construction, and common sense call for rejecting respondents' invitation to misinterpret Congress's actions in enacting Section 92.

Lastly, despite respondents' assertions to the contrary, *see* Resp. Br. 41-49, the court of appeals should not have even had the opportunity to construe Section 92 erroneously out of existence.

I. SECTION 92 REMAINS IN FORCE

A. The Language, Structure, And Substance Of The 1916 Act Show That Congress Enacted Section 92 As Part Of The Federal Reserve Act Of 1913

At the outset, respondents' attempt to frame the issue before the Court as hinging on "separation of powers principles" needs to be put to rest. *See* Resp. Br. 11-14. Despite respondents' rhetoric, this case does not call for the Court "to enact, amend or repeal laws—on policy or other grounds." Resp. Br. 12. To the contrary, as this Court has recently reiterated, "'[i]n ascertaining the plain meaning of [a] statute, the court must look to the particualar statutory language at issue, as well as the language and design of the statute as a whole.'" *McCarthy v. Bronson*, 111 S. Ct. 1737, 1740 (1991) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)). "[D]eciding what a statute means," the Court has recognized, is "the quintessential judicial function." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 98 n.8 (1983). In other words, this case calls for the Court to exercise the "judiciary['s] . . . final authority on issues of statutory construction." *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

1. A close look at the language of the 1916 enactment confirms that Congress intended to add what became

Section 92 to Section 13 of the Federal Reserve Act of 1913, not to Section 5202 of the Revised Statutes. As both the United States and we have explained, the references to "this Act" in the paragraphs of Section 13 of the Federal Reserve Act preceding and following the reference to Section 5202 confirm that Section 92 was not enacted as part of Section 5202. *See* U.S. Br. 15-18; Pet. Br. 12-13. Respondents agree that "this Act" refers to the Federal Reserve Act, but argue that such a reference does not place Section 92 within the Federal Reserve Act. Resp. Br. 27-28.

Respondents' argument fails to come to grips with the components of the 1916 enactment, namely, the precise language of the 1913 Act which had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 79a-80a. That amendment to Section 5202 of the Revised Statutes, by necessity, referred to the "Federal Reserve Act." Pet. App. 80a. By contrast, the concluding paragraph of the 1913 Act, which concerned Federal Reserve bank rediscounts of bills and acceptances, referred expressly to "this Act," namely, the Federal Reserve Act. *See* Pet. App. 80a. That concluding paragraph, which was obviously part of the Federal Reserve Act, appears in the 1916 enactment immediately preceding the reference to Section 92. *See* Act of Sept. 7, 1916, ch. 461, Pub. L. No. 64-270, 39 Stat. 753; Pet. App. 70a (paragraph 8). The reference to "this Act" in the rediscount provision (paragraph 8)—a part of the Federal Reserve Act—confirms that the Section 5202 reference had ended.

Seeking refuge in the statutory text, as opposed to relying solely on punctuation, respondents contend that "the language of the remaining text would unambiguously place Section 92 within Rev. Stat. § 5202" because Congress used certain prefatory phrases as "signposts" within the 1916 Act. Resp. Br. 24. Because Section 92 is not preceded by a separate prefatory phrase, respondents argue, Section 92 is part of Section 5202, which is preceded by the phrase "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows." Pet. App. 70a; *see* Resp. Br. 24-25. Respondents overlook the fact that such prefatory language appeared initially in Section 13 of the 1913 Act, where Congress had amended Section 5202 by adding a fifth provision. *See* Federal Reserve Act of 1913, ch. 6, Pub. L. No. 63-43, § 13, 38 Stat. 264; Pet. App. 79a-80a. In order to amend Section 13 in 1916, Congress simply restated that provision of the Federal Reserve Act in its entirety, including the portion of the 1913 Act that had referred to amending Section 5202. *See* Pet. App. 70a, 79a-80a. What respondents deem a signpost is actually a remnant of the previous legislation.[4]

That point is confirmed by Congress's amendment in 1916 to the Federal Reserve bank rediscount authority established by Section 13 of the Federal Reserve Act—an authority established by the Federal Reserve Act that applies only to Federal Reserve banks, not to member

[4] Respondents assert that in *Posadas v. National City Bank*, 296 U.S. 497 (1936), this Court concluded that the 1916 Act amended Section 5202 of the Revised Statutes. Resp. Br. 25. *Posadas* cannot bear the weight respondents would have it carry. There, in construing Section 25 of the Federal Reserve Act, the Court stated in passing that the 1916 Act "amends," among other provisions, "§ 5202 of the Revised Statutes." *Posadas v. National City Bank*, 296 U.S. at 502. In *Posadas*, the Court had no occasion to scrutinize the relevant statutory language and its history. In such circumstances, the Court's statement, although understandable, is scarcely authoritative of the issue presented here.

Respondents assert that *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958), supports their "signpost" theory because the Court "relied on a similar analysis of Congress' use of quotation marks and introductory phrases." Resp. Br. 19. In that case, however, the Court determined congressional intent by relying on the language of the two statutes at issue, the pertinent legislative history, and the "title of the whole Robinson-Patman Act." *See* 355 U.S. at 378-382. That is precisely what petitioner and the United States are requesting the Court to do here.

banks or national banks. That provision appears in the 1913 Act after the reference to Section 5202. By its terms, that provision belongs in the Federal Reserve Act. *See* 38 Stat. 264; Pet. App. 80a. In 1916, Congress amended that Federal Reserve Act authorization to include authorizations for discount and purchase, including those for "foreign bills of exchange, and of acceptances authorized by this Act." 39 Stat. 753; Pet. App. 70a. In other words, in 1916 Congress was amending the Federal Reserve Act, not Section 5202.[5]

2. Respondents next assert that petitioners "seek to use the title of the 1916 Act to create ambiguity, because the title did not specifically mention that Rev. Stat. § 5202 was being amended." Resp. Br. 28. The statutory language and confusing punctuation—not the title—give rise to ambiguity and the need for statutory construction. *See, e.g.*, Pet. Br. 11-15; U.S. Br. 14-15. The title of the 1916 enactment, "An Act To amend certain sections of the Act entitled 'Federal reserve Act,' approved December twenty-third, nineteen hundred and thirteen," 39 Stat. 752; Pet. App. 67a, describes precisely what Congress sought to accomplish. For that reason, the statute's title is a legitimate "aid in resolving an ambiguity in the legislation's text." *INS v. National Ctr. for Immigrants' Rights, Inc.*, 112 S. Ct. 551, 556 (1991) (citations omitted); *see Brotherhood of R.R. Trainmen v. Baltimore & O.R.R. Co.*, 331 U.S. 519, 529 (1947) (titles "are but tools available for the resolution of a doubt").[6]

[5] In the 1916 Act, that Federal Reserve Act authority (paragraph 8) appears in between the reference to Section 5202 and the reference to Section 92. Since that authority is undoubtedly a part of the Federal Reserve Act, it would make little sense to assume that the paragraph following it, Section 92, somehow should be treated as part of a wholly independent provision, Section 5202 of the Revised Statutes.

[6] Indeed, the titles of other statutes enacted during the period at issue show that when Congress intended to amend a section of the Revised Statutes as well as a provision of the Federal Reserve Act, Congress reflected that intent in the title. *See, e.g.*, Act of Sept. 26, 1918, ch. 177, 40 Stat. 967; Act of Mar. 3, 1919, ch. 101, 40 Stat. 1314; *see* U.S. Br. 18. Respondents dispute such a practice, citing the fact that neither the title to the 1913 Federal Reserve Act nor the title to the 1918 War Finance Corporation Act, both of which amended Section 5202 of the Revised Statutes, mentioned such an amendment. *See* Resp. Br. 29 & n.30. Each of those titles, however, contained a general description of the legislation's purpose. Those titles did not purport to specify which statutory provisions were being revised—the convention adopted by the 1916 enactment, and those previously cited.

3. In light of the above, respondents' reliance on the placement of punctuation cannot be squared with this Court's instruction to lower courts, when construing statutes, to "disregard the punctuation, or . . . repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83 (1932).[7] Moreover, respondents seek to distance themselves from the "comma cases," asserting that those cases involved confusing statutes, "susceptible of differing interpretations." Resp. Br. 23.[8] But that is precisely what is at issue here. Those cases—like this one—involved language made confusing by the inadvertent placement of punctuation. For that reason, this Court has long recog-

[7] Respondents attack as "obviously hyperbole" (Resp. Br. 23) the Court's remark in *Shreveport* that "[p]unctuation marks are no part of an act." 287 U.S. at 82. That attack is beside the point, as neither petitioner nor the United States has made such a claim here.

[8] *See, e.g., United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 82-83 (1932); *Crawford v. Burke*, 195 U.S. 176, 192 (1904); *Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837); *Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917).

Respondents attempt summarily to dismiss *Taylor v. United States*, 495 U.S. 575, 581-99 (1990), because it "does not involve punctuation at all." Resp. Br. 22 n.24. That effort is feeble. In *Taylor*, this Court construed the statute to include an entire provision—the statutory definition of burglary—despite the fact that Congress had previously repealed that provision when it had amended the statute.

nized that "[p]unctuation is a most fallible standard by which to interpret a writing." *Ewing's Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 54 (1837).[9]

Respondents assert that "[t]his case is remarkably similar" to *In re Schilling*, 53 F. 81 (2d Cir. 1892). Resp. Br. 23. In that case, the court of appeals—faced with statutory language made confusing by punctuation—resorted to the legislative history. In particular, the court examined the statute as it was "reported to the two houses by the conference committees" to determine "the intent of the statute." 53 F. at 83. *Schilling*, contrary to respondents' assertion, supports petitioners' construction of the statute at issue here. As is apparent from the available legislative record, *see* Pet. Br. 16-19; p. 9, *infra*, Congress did not intend for the quotation marks to have any significance in interpreting the statute, and thus the placement of the punctuation in the final printed version of the 1916 enactment should not control over evidence in the text that Congress placed Section 92 in the Federal Reserve Act, not in Section 5202 of the Revised Statutes.

4. Respondents all but ignore the available legislative record surrounding the enactment of Section 92. That is not surprising because the legislative record undermines respondents' analysis of the statute. The Senate passed the bill proposing Section 92 after the Committee on Banking and Currency had deliberately omitted the quotation marks. *See* H.R. 13391, 64th Cong., 1st Sess. § 13 (1916) (Pet. Ldg. 31-48); *see also* Pet. Ldg. 11-29. All

[9] Respondents state that "[p]unctuation can be a critical element in discerning the meaning of a statutory phrase." Resp. Br. 23. That statement is unexceptionable, but the cases respondents cite do not support it. In *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989), the Court relied on punctuation only to confirm its interpretation based on the statutory text. Similarly, in *United States v. Naftalin*, 441 U.S. 768, 774 n.5 (1979), the Court explained that punctuation, although not decisive, can "reaffirm conclusions drawn from the words themselves."

the subsequent House, Senate, and Conference Committee versions of the bill either had no quotation marks, or quotation marks only at the beginning of each paragraph—thus making clear that Section 92 was part of the Federal Reserve Act, not Section 5202 of the Revised Statutes. *See* Pet. Br. 17-18 & n.21. It was only in the versions reprinted in the House and Senate records—after the Conference Committee's final marked-up version had been approved—that the inadvertent clerical insertion of the current, confusing quotation marks appeared. *See* Pet. Br. 18 & n.22.

The actions by the Senate committee, the Senate, the House, and the Conference Committee regarding the quotation marks, contrary to respondents' assertion, are "relevant express statement[s] of Congress' intent." Resp. Br. 32. As is apparent, the inadvertent quotation marks appeared later in the versions reprinted in the House and Senate records. In other words, such a clerical insertion, or error, in view of the context outlined above, may not change the substance of Congress's intended enactment. Indeed, the drafting history of this legislation confirms the wisdom of one court's recognition that "[t]he presence or absence of a comma, according to the whim of the printer or proof reader, is so nearly fortuitous that it is a wholly unsafe aid to statutory interpretation." *Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917).[10]

Respondents assert that the so-called "enrolled bill doctrine" precludes this Court from considering the pertinent legislative record. *See* Resp. Br. 20-22. Contrary to respondents' argument, that "doctrine" does not involve

[10] Respondents ask this Court, in the name of plain meaning, to disregard the legislative record. *See* Resp. Br. 31-32. As set forth above, this is not such a case. Accordingly, this Court should use all appropriate extrinsic aids to statutory construction. *See Train v. Colorado Pub. Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976); *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437, 444 (1955).

the sort of statutory construction question at issue here. Instead, the discrete principle simply calls for courts to respect the validity of all bills authenticated as having passed Congress and as having been signed by the President. The principle protects against the possibility that "the speaker of the House of Representatives and the President of the Senate . . . [might] impose upon the people as a law a bill that was never passed by Congress." *Marshall Field Co. v. Clark*, 143 U.S. 649, 672 (1892).

Indeed, this Court's recent decision in *United States v. Munoz-Flores*, 495 U.S. 385 (1990), succinctly explains why the "enrolled bill doctrine" is not at all relevant here:

> [*Marshall Field & Co. v. Clark*] concerned "the nature of the evidence" the Court would consider in determining whether a bill had actually passed Congress. Appellants had argued that the constitutional Clause providing that "[e]ach House shall keep a Journal of its Proceedings" implied that whether a bill had passed must be determined by an examination of the journals. The Court rejected that interpretation of the Journal Clause, holding that the Constitution left it to Congress to determine how a bill is to be authenticated as having passed. In the absence of any constitutional requirement binding Congress, we stated that "[t]he respect due to coequal and independent departments' demands that the courts accept as passed all bills authenticated in the manner provided by Congress."

Id. at 391-92 n.4 (citations omitted).

Here, petitioner is not suggesting that the 1916 Act was not the bill passed by Congress. Nor is petitioner asking this Court to stray from the four corners of the enrolled bill and rewrite the 1916 Act. Rather, petitioner is asking this Court to examine the language of the enactment, using the available legislative record as an aid to construction. Neither the "enrolled bill doctrine" nor

common sense precludes such an exercise of statutory interpretation. *See Fex v. Michigan*, 113 S. Ct. 3085, 1089 (1993) ("resolution of the [statutory] ambiguity is readily to be found in what might be called the sense of the matter, and in the import of related provisions").

5. Respondents next criticize petitioner for entering a "foray into the 'substance' of federal banking law." Resp. Br. 29. In respondents' view, since Section 5202 concerns national banks and Section 13 concerns the powers of Federal Reserve banks, then Section 92, which concerns national banks, properly belongs within Section 5202.

First, consideration of the subject matter of the statutes at issue is scarcely revolutionary. *See, e.g., Crandon v. United States*, 494 U.S. 152, 158-64 (1990); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51-56 (1987). Second, respondents' superficial distinction overlooks the substance of each of these provisions. Congress enacted Section 5202 during the Civil War to prevent excess indebtedness of national banks. Decades later, Congress enacted the Federal Reserve Act of 1913 to establish centralized federal banking authority, thereby creating the Federal Reserve banks and also regulating national banks by requiring them to become members of the Federal Reserve system. In particular, Section 13 of the Act set forth the several powers of Federal Reserve banks, such as the authority to accept, discount, and rediscount various forms of notes and commercial paper, including those issued by national banks. *See* 38 Stat. 263-64; Pet. App. 77a-79a. Congress's placement of Section 92 in the broader Section 13, rather than in the narrower Section 5202, is thus understandable. Common sense dictates that Congress would have placed Section 92 in the Federal Reserve Act instead of Section 5202 because Section 5202 is a discrete provision of the original National Currency Act that dealt exclusively with limits on indebtedness of national banks. Congress would have no reason to tack onto this provision the entirely distinct

subject matter of Section 92—insurance agency and real estate brokerage powers of national banks.[11]

B. Congress Did Not Repeal Section 92 By The 1918 War Finance Corporation Act

Turning to the 1918 War Finance Corporation Act, respondents offer no plausible basis for assuming that Congress had any intention of repealing the national bank insurance authority it had adopted in 1916. Nonetheless, respondents argue that this is not a case of a disfavored implied repeal because the 1918 Act expressly provided "[t]hat all provisions of any Act or Acts inconsistent with the provisions of [the 1918] Act are hereby repealed." Resp. Br. 18 (internal quotation marks and citations omitted; brackets in original).[12]

That argument is makeweight. National bank insurance authority is scarcely "inconsistent" with the financing efforts engendered by the War Finance Corporation Act. It is thus understandable that Congress made no mention of Section 92 during its consideration of the 1918 Act. Accordingly, in the face of that legislative record, there is no basis for assuming that Congress, by enacting the War Finance Corporation Act in 1918, had

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[11] Respondents suggest that since then-Comptroller Williams initially proposed Section 92 as an amendment to the National Bank Act, it is more likely that Congress enacted that provision as part of Section 5202 of the Revised Statutes. Resp. Br. 30-31. The contemporaneous legislative record, however, shows that Congress proposed to add Section 92 as an amendment to the Federal Reserve Act, not to Section 5202 of the Revised States, and thus did not follow the Comptroller's proposal. *See* Pet. Ldg. 18 (Congress did not place any quotation marks in that aspect of the original bill containing the amendment adding Section 92).

[12] Time and again, this Court has adhered to "[t]he cardinal rule . . . that repeals by implication are not favored." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936); *see Morton v. Mancari*, 417 U.S. 535, 549 (1974); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

any intention of repealing the national bank insurance authority it had adopted two years before.[13]

C. The Uniform Consideration By The Pertinent Authorities Regarding The Validity Of Section 92 Is Entitled To Considerable Weight

Finally, respondents contend that "there is no support for deferring to the views of the Comptroller or Federal Reserve Board as to Section 92's placement or repeal." Resp. Br. 34. That contention is meritless, given the premise that there is at least ambiguity in the texts of the relevant statutes. *See, e.g.*, Pet. Br. 26-27; U.S. Br. 31-32. As this Court has recognized:

> In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry out its provisions into effect, is entitled to very great respect.

Edwards's Lessee v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827); *accord Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 315 (1933).[14]

Both the Comptroller and the Federal Reserve Board, in contemporaneous compilations of pertinent banking statutes, set forth Section 92 as part of the Federal Reserve Act, and clarified its placement by changes to the inadvertent quotation marks. *See* Pet. Br. 27. The Comptroller reprinted Section 92 along with the entire 1916 Act, but without the confusing punctuation (like the Senate version of the bill). *See* S. Doc. No. 412, 64th Cong., 1st Sess. 136-37 (1917); *see also* S. Doc. No. 216,

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[13] Moreover, as the United States has pointed out, neither Senator Owens, Section 92's principal sponsor, nor Comptroller Williams, each of whom retained their positions, made any comment in the pertinent legislative record that suggested that Congress was ever considering a repeal of Section 92. *See* U.S. Br. 24-25.

[14] Respondents do not address either of these applicable governing precedents.

66th Cong., 2d Sess. 146 (1920) (compilation prepared under the Comptroller's direction). The Federal Reserve Board's reprint of the 1916 Act in its *Third Annual Report* also places Section 92 in Section 13 of the Federal Reserve Act. *See Third Annual Report of the Federal Reserve Board* 135-36 (1917).[15] Moreover, in a post-1918 compilation, the Federal Reserve Board continued to show Section 92 as part of Section 13 of the Federal Reserve Act. *See* Federal Reserve Board, *The Federal Reserve Act As Amended* 30 (1919).

Respondents similarly seek to brush aside Congress's affirmative treatment of Section 92's existence. *See* Resp. Br. 38-41. As we previously pointed out, in 1982, for example, Congress amended an aspect of Section 92 unrelated to the insurance provision. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, § 403(b), 96 Stat. 1510-11. In 1987, Congress imposed a one-year moratorium on the expansion of insurance activities "pursuant to the Act of September 7, 1916 (12 U.S.C. 92)." Competitive Equality Banking Act of 1987,

[15] Contrary to respondents' suggestion, *see* Resp. Br. 35 n.36, the Federal Reserve Board distinguished Section 92 from the amendment to Section 5202 of the Revised Statutes in at least two ways. First, the paragraph containing the amendment to Section 5202 begins with quotation marks, with no quotation marks at the end of the preceding paragraph (like the House version of the bill). *See Third Annual Report of the Federal Reserve Board* 136 (1917); *compare* H.R. Conf. Rep. No. 1175, 64th Cong., 1st Sess. (1916) (Pet. Ldg. 49-53). The Federal Reserve Board may have been attempting to clarify that all paragraphs following the amendment to Section 5202 refer back to the initial line without quotation marks, "[t]hat section thirteen be, and is hereby, amended to read as follows," and do not refer back to the paragraph amending Section 5202. Second, the Board's compilation uses italics to indicate any language changed from the previous text. In light of the placement of quotation marks in this compilation, the most natural reading of the italicized language is that it is exclusively the language amending Section 13. In other words, Section 92—appearing in italics—is an amendment to Section 13.

Pub. L. No. 100-86, § 201(b)(5), 101 Stat. 583.[16] And in 1991, Congress considered—but did not enact—legislation that would have substantially amended Section 92 and curtailed national banks' insurance activities.[17]

In these circumstances, the Court's statement in *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572 (1980), is particularly apt:

> [W]hile the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight, . . . and particularly so when the precise intent of the enacting Congress is obscure.

Id. at 596 (citations omitted).

II. THE COURT OF APPEALS ERRED IN DETERMINING WHETHER SECTION 92 REMAINS IN FORCE

1. Respondents contend that the court of appeals properly reached out to decide whether Section 92 remains in force because that issue falls within the well-established "plain error" doctrine. *See* Resp. Br. 43-45 & n.50. In so contending, respondents suggest that Section 92's "'nonexistence is apparent on the face of things.'" Resp. Br. 45 n.50 (quoting *United States v. Burke*, 112 S. Ct. 1867, 1877 (1992) (Scalia, J., concurring)). The so-

[16] In imposing that moratorium, Congress did not at all question the validity of Section 92. *See, e.g.*, S. Rep. No. 19, 100th Cong., 1st Sess. 17 (1987) ("Existing law authorizes a national bank 'located and doing business in any place the population of which does not exceed five thousand inhabitants' to act as an insurance agent. The scope of that authority is currently in dispute.").

[17] *See* H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 1, at 81-82, 192 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); H.R. Rep. No. 157, 102d Cong., 1st Sess., pt. 4, at 56-57, 154 (1991) (describing proposed § 432 of H.R. 6, 102d Cong., 1st Sess. (1991)); S. Rep. No. 167, 102d Cong., 1st Sess. 170-71, 480 (1991) (describing proposed § 771 of S. 543, 102d Cong., 1st Sess. (1991)).

called "nonexistence" of Section 92, however, was not even apparent to respondents before the issuance of the decision below, *see* Pet. App. 24a, nor was it apparent to federal courts, including this Court, Congress, or the pertinent regulatory authorities. *See* Pet. Br. 26-30. Indeed, the continuing validity of Section 92 had understandably remained unchallenged in—and had even been ratified—by the reported case law. Moreover, the court of appeals itself acknowledged that the statutory analysis confirming Section 92's validity is "plausible." Pet. App. 17a.[18] In these circumstances, the "plain error" doctrine does not sanction the court of appeals' decision.[19]

2. Respondents also contend that "there was no Article III bar to the court of appeals' decision" because the court decided "an Article III case or controversy" between the parties. Resp. Br. 42-43. The case or controversy before the court of appeals, however, did not include any disagreement over the existence of Section 92. During oral argument before the court of appeals, respondents' counsel stated that "we cannot advance a substantial argument that section 92 no longer exists." Pet. App. 24a. The record thus shows that the parties reached the same conclusion that Section 92 remained valid. That

[18] For these reasons, respondents err in relying on *Arcadia, Ohio v. Ohio Power Co.*, 111 S.Ct. 415 (1990), where this Court resolved the case on a ground not advanced by any party, *i.e.*, that Section 318 of the Federal Power Act was inapplicable, as opposed to what happened here, *i.e.*, a court's construing an otherwise plausibly valid law out of existence.

[19] In defending the decision below, respondents mischaracterize the district court's passing reference that Section 92 remained valid law. Contrary to respondents' assertions, the district court did not attempt to reenact a repealed law, nor did the court decide "that the repealed statute might exert force, based on the power of opinion alone." Resp. Br. 47. Such a decision might have been subject to review as plain error. But the district court did no such thing. The court merely respected precedent and exercised judicial restraint.

agreement, contrary to respondents' suggestion, is not tantamount to putting the underlying question of law "in controversy." Accordingly, as petitioner has pointed out, *see* Pet. Br. 34-35, this Court's decisions in *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 (1982), and *Williams v. Zbaraz*, 448 U.S. 358, 367 (1980), cannot be swept aside.[20] In sum, as the validity of Section 92 was affirmatively uncontested, that issue should have remained undecided.

CONCLUSION

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[20] Respondents mistakenly rely on *Town of South Ottawa v. Perkins*, 94 U.S. 260 (1877), as authority for asserting that the issue of Section 92's validity was properly before the court of appeals. *See* Resp. Br. 45-46. In *Perkins*, this Court rejected an application of the doctrine of estoppel to the specific issue of whether a state legislature had enacted legislation authorizing the issuance of bonds. *See* 94 U.S. at 266-67. Here, by contrast, there is no issue regarding whether Congress enacted Section 92 in 1916. Rather, the issue concerns the appropriate construction of the provision that Congress enacted.

Nos. 92-484 and 92-507

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PETITIONER

v.

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INC., ET AL.

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OF THE CURRENCY, ET AL., PETITIONERS

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA,
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ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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REPLY BRIEF FOR THE FEDERAL PETITIONERS

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1. Respondents primarily argue that this Court must give controlling significance to the quotation marks that appeared on the "enrolled bill" in 1916, see *Field* v. *Clark*, 143 U.S. 649 (1892), even if that

would lead to a result Congress did not intend. Thus, respondents argue that "if the repeal of Section 92 was 'inadvertent,' it is of no significance." Br. 13. But cf. *Conroy* v. *Aniskoff*, No. 91-1353 (Mar. 31, 1993), slip op. 7 n.12.

But the quotation marks do not resolve the question presented; they merely raise an issue as to where Section 92 was to be placed. That is, while the quotation marks suggest that Section 92 was to be placed in Rev. Stat. § 5202, the text and structure of the 1916 Act show that Section 92 was placed in Section 13 of the Federal Reserve Act. As we have explained, the text and structure of the 1916 Act should control over the punctuation, particularly since Congress actually intended to delete the quotation marks. See Gov't Br. 21.

The key provision showing that Section 92 was placed in Section 13 of the Federal Reserve Act is the paragraph that preceded Section 92 in the 1916 enactment. That preceding paragraph—which granted the Federal Reserve Board authority to regulate certain practices of federal reserve banks—had been enacted as part of Section 13 of the Federal Reserve Act in 1913, as respondents' lodging plainly shows. Resp. Lodging 13-14. Both in 1913 and as amended in 1916, that preceding paragraph referred to "this Act," by which it plainly meant the Federal Reserve Act, as respondents concede. Br. 27. In our view, the reference to "this Act" shows that the paragraph preceding Section 92 remained part of Section 13 of the Federal Reserve Act in 1916. Respondents contend, however, that in 1916 Congress accidentally moved the paragraph that preceded Section 92 from Section 13 of the Federal Reserve Act to Rev. Stat. § 5202. This Court may overlook the

reference to "this Act," respondents further contend, on account of the happy coincidence that Rev. Stat. § 5202 refers to the "Federal reserve Act." That is, respondents argue that after 1916 "this Act" may be viewed as an antecedent reference to "Federal reserve Act" in Rev. Stat. § 5202.

That "antecedent reference" argument is unpersuasive. The reference to "this Act" in the paragraph preceding Section 92 is more naturally read as referring to the Act in which the provision is contained—*i.e.*, the Federal Reserve Act—both before and after 1916. That is how Congress used the phrase "this Act" in two other places in the 1916 amendments to the Federal Reserve Act. 92-507 Pet. App. 83a (paragraph beginning "'(m)"), 84a (first full paragraph). Moreover, using "this Act" in Rev. Stat. § 5202 to refer to the Federal Reserve Act would be confusing—a reader would normally suppose that a reference to "this Act" in Rev. Stat. § 5202 would be a reference to Rev. Stat. § 5202, not to the Federal Reserve Act. At a minimum, there would be ambiguity that could have been eliminated simply by referring to the Federal Reserve Act by its full name—had Congress intended to transfer the paragraph preceding Section 92 from the Federal Reserve Act to Rev. Stat. § 5202.

Moreover, the structure of the banking laws shows that Congress did not intend to move the paragraph preceding Section 92 to Rev. Stat. § 5202. That preceding paragraph belonged in the Federal Reserve Act because it granted the Federal Reserve Board authority to regulate certain discounting and rediscounting practices of federal reserve banks. Respondents argue (Br. 29-31) that it would not have

been unreasonable for Congress to have placed Section 92 in the Revised Statutes (although Rev. Stat. § 5202 had been limited for more than fifty years to matters involving the indebtedness of national banks), but they do not even suggest that it would have been plausible for Congress to have intended to transfer the paragraph preceding Section 92 to the Revised Statutes. And if that preceding paragraph remained in the Federal Reserve Act after 1916, so did Section 92.[1]

Respondents protest that to conclude that Section 92 was not enacted as part of Rev. Stat. § 5202 would render "meaningless" the language in the 1916 Act stating that Rev. Stat. § 5202 was being "amended so as to read as follows." Br. 25-26. But as we explain in our opening brief (at 19 n.5), the paragraph regarding Rev. Stat. § 5202, including the language stating that Rev. Stat. § 5202 was "amended so as to read as follows," was carried over from the 1913 Act as part of a comprehensive restatement of Section 13 of the Federal Reserve Act, which was reprinted in its entirety in 1916. In other words, the clause on which respondents rely was merely a leftover, like many other clauses in Section 13 that appeared in the 1913 Act and were included

[1] Because the text and structure of the 1916 Act conflict with the quotation marks, *In re Schilling*, 53 F. 81 (2d Cir. 1892), upon which respondents rely (see Resp. Br. 23-24), presents a different situation. *Schilling* involved a case in which the inference to be drawn from assertedly misplaced parentheses was not rebutted by anything in the text of the statute. In this case, by contrast, there is conflicting evidence on the face of the 1916 Act which bears directly on the proper placement of Section 92.

without change in the 1916 Act. Compare 92-507 Pet. App. 80a-82a with *id.* at 83a-88a.[2]

The title of the 1916 Act—"An Act To amend certain sections of the Act entitled 'Federal reserve Act,' approved December twenty-third, nineteen hundred and thirteen"—supports the conclusion that Rev. Stat. § 5202 was not amended in 1916, since Rev. Stat. § 5202 is not mentioned in the title. As we illustrate in our opening brief (at 18), the practice at that time was that when Congress titled a provision by listing the Acts that were being amended, it listed *all* of the Acts that were being amended. Respondents point (Br. 29) to two statutes from that era that did not list the Acts that were being amended. Those two statutes differ from the 1916 Act, however, because they did not list any of the Acts that were being amended, but instead contained purely descriptive titles.[3] That does not rebut

[2] Respondents note (Br. 26) that in *Posadas* v. *National City Bank*, 296 U.S. 497, 502 (1936), a case involving Section 25 of the Federal Reserve Act, this Court stated in passing that "[t]he act of September 7, 1916, amends §§ 11, 13, subsection (e) of § 14, the second paragraph of § 16, §§ 24 and 25, and § 5202 of the Revised Statutes." That statement is not a holding that Rev. Stat. § 5202 was amended in 1916. It merely shows that, in the absence of an examination of the 1913 Act, a reader of the 1916 Act might not realize that the paragraph involving Rev. Stat. § 5202 was simply carried over as part of the restatement of Section 13 of the Federal Reserve Act.

[3] See Federal Reserve Act of 1913, ch. 6, 38 Stat. 251 ("An Act To provide for the establishment of Federal reserve banks, to furnish an elastic currency, to afford means of rediscounting commercial paper, to establish a more effective supervision of banking in the United States, and for other purposes."); War Finance Corporation Act of 1918, ch. 45, 40

the conclusion that when Congress did not provide a descriptive title, but instead listed the Acts that were being amended, it gave a comprehensive list of the Acts that were being amended.

2. Unlike the court of appeals, respondents do not emphasize the 1918 Act. The D.C. Circuit stated: "Whatever the intentions of the 64th Congress in 1916, they are essentially irrelevant to the task at hand. What we are called upon to determine are the consequences of the action taken by the 65th Congress when, two years later, it voted the 1918 Act into law." 92-507 Pet. App. 12a. The court of appeals then stated that in 1918 "there were only three sources to which [Congress] could turn for up-to-date information: the Statutes at Large * * * or either of two privately published services." *Id.* at 13a. Both of those privately published services placed Section 92 in Rev. Stat. § 5202, and the court's premise that the drafters would have consulted one of those services or the Statutes at Large formed the basis for the court's holding "that the 65th Congress understood section 92 to be part of section 5202, and that its exclusion from the amended section 5202 signaled its repeal." *Ibid.*

As we explain in our opening brief, the court of appeals' premise was flawed. There were not "only three sources" (Pet. App. 13a) to which Congress could have turned in 1918. There was a fourth—a compilation of the federal banking laws that had been

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Stat. 506 ("An Act To provide further for the national security and defense, and, for the purpose of assisting in the prosecution of the war, to provide credits for industries and enterprises in the United States necessary or contributory to the prosecution of the war, and to supervise the issuance of securities, and for other purposes.").

prepared by the Comptroller of the Currency and published by the Senate in 1917. S. Doc. No. 412, 64th Cong., 1st Sess. (1917). That compilation, which respondents have reprinted in part in the lodging they have filed, shows Section 92 twice—as part of Section 13 of the Federal Reserve Act and as part of Rev. Stat. § 5202. Resp. Lodging 50 (Rev. Stat. § 5202), 52 (Section 13). At the least, the Comptroller's compilation shows that the 1916 Act was ambiguous with respect to the placement of Section 92. Moreover, in light of its dual appearance in the federal banking laws, the drafters of the 1918 Act would have assumed that Section 92 would continue in force as part of Section 13 of the Federal Reserve Act however Rev. Stat. § 5202 was amended. They might even have thought that deleting Section 92 from Rev. Stat. § 5202 while retaining it in Section 13 of the Federal Reserve Act would remove an unnecessary redundancy from the federal banking laws.

In light of the court of appeals' flawed premise, respondents' argument does not track the opinion of the D.C. Circuit. But respondents defend the court of appeals' result by stating that it is "unclear" whether the drafters of the 1918 Act would have turned to the Comptroller's 1917 compilation of the federal banking laws that was published by the Senate. Br. 36. Of course, we cannot prove what the drafters used. But it is hard to see why Congress would have published a compilation of the federal banking laws in 1917, and then ignored it in 1918 in order to consult privately published compilations.[4]

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[4] Respondents also state that the "Comptroller compilation" is "like the two privately published services to which the court of appeals referred." Br. 36. As respondents' lodg-

Respondents also suggest that "if Congress had relied on the Comptroller compilation * * *[,] Congress would have been impelled to amend both Section 5202 *and* the Federal Reserve Act in 1918." Br. 36 n.39. That is not so. By amending Rev. Stat. § 5202 in 1918, Congress accomplished its goal of adding a sixth provision to Rev. Stat. § 5202 that authorized national banks to assume "[l]iabilities incurred under the provisions of the War Finance Corporation Act." 92-507 Pet. App. 94a. A reader of Section 13 of the Federal Reserve Act would also have seen a reference to Rev. Stat. § 5202 showing that Congress previously had added a fifth provision authorizing national banks to assume "[l]iabilities incurred under the provisions of the Federal Reserve Act." 92-507 Pet. App. 82a. But contrary to respondents' contention, Congress would not have felt "impelled" in 1918, as part of the War Finance Corporation Act, to amend Section 13 of the Federal Reserve Act to add the sixth proviso there as well. That would have been unnecessary because a reader of Section 13 of the Federal Reserve Act would have consulted Rev. Stat. § 5202 to be sure that he had the up-to-date version of that Act.

Thus, focusing on 1918 provides no basis for the conclusion that Congress intended to repeal Section 92. To the contrary, respondents have failed to supply any reason why Congress would have wanted to repeal Section 92 in the course of passing the 1918

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ing shows, however, the two private compilations differ from the Comptroller's on the key point at issue here—the private compilations reprint Section 92 only once and they place it in Rev. Stat. § 5202, not in Section 13 of the Federal Reserve Act. Resp. Lodging 41-42 (Mallory compilation), 45-46 (Barnett compilation).

War Finance Corporation Act. See generally Gov't Br. 25-27. Yet where "the compromise or abandonment of previously articulated policies" is involved, one "would normally expect some expression by Congress that such results are intended." *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976). In this case, there is no indication in the legislative history of the 1918 Act that Congress thought it was repealing Section 92. Particularly given that Senator Owen, Section 92's sponsor, remained the Chairman of the Senate Banking Committee and was a major participant in the debates over passage of the 1918 Act, and that Comptroller Williams, who originally proposed Section 92, remained the Comptroller of the Currency (see Gov't Br. 24-25), this is a case where silence is "most eloquent." *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979). See *American Hospital Ass'n* v. *NLRB*, 111 S. Ct. 1539, 1544 (1991).

Respondents suggest that there was no need for Congress in 1918 to explain the deletion of national bank insurance agency authority because, they contend, Senator Owen said he was not concerned "one way or the other" with such authority. Br. 33 n.33. But Senator Owen's statement that "[t]he matter is unimportant either way" (53 Cong. Rec. 11,153 (1916)) was made in the course of remarking that he was willing to amend Section 92 as proposed to include towns of up to 5,000 (rather than 3,000) inhabitants. Quite plainly, Senator Owen was referring to where to draw the line among various small towns as to Section 92's application, and was not suggesting that the national bank insurance agency

authority was itself unimportant. To the contrary, in proposing that authority, Comptroller Williams emphasized that it dealt with a problem which he had been considering "[f]or some time." 53 Cong. Rec. 11,001 (1916). Moreover, the Comptroller reported to Congress in 1918 that banks in 41 States and Hawaii had exercised the authority granted by Section 92. 2 *Annual Report of the Comptroller of the Currency* (Dec. 2, 1918), H.R. Doc. No. 1453, 65th Cong., 3d Sess. 234-237 (1919). Thus, Congress was aware that a large number of banks had relied on Section 92, which shows that it was not an unimportant provision and makes it all the more implausible to suggest that Congress would have repealed Section 92 without comment.

Moreover, respondents do not suggest that the authorities granted by the paragraphs on either side of Section 92—and which were, in their view, also repealed in 1918—were insubstantial. To the contrary, in proposing the provision that followed Section 92 in the 1916 Act, Federal Reserve Board member Paul M. Warburg predicted that it "would prove a great help for our American banks." Letter to Senator Robert L. Owen (May 11, 1916), *reprinted in* S. Rep. No. 481, 64th Cong., 1st Sess. 10 (1916).

3. Respondents also contend (Br. 34) that the Comptroller's construction of the 1916 and 1918 Acts is not entitled to deference because "no agency expertise comes into play in judging whether Congress did or did not repeal a statutory provision." But the Comptroller was "charged with the responsibility of setting [Section 92's] machinery in motion," and where Section 92 was located (and whether it was repealed) is plainly a matter that the Comptroller

had to decide in "making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Moreover, the contemporaneous administrative construction carries the most weight where it was the administrator who "suggested the provisions' enactment to Congress" (*United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549 (1940)), and it was the Comptroller who proposed the enactment of Section 92 (see 53 Cong. Rec. 11,001 (1916)). Contrary to respondents' claim (Br. 35) that the Comptroller thought that Section 92 had been added to Rev. Stat. § 5202, the Comptroller located that provision in both Rev. Stat. § 5202 and Section 13 of the Federal Reserve Act following the enactment of the 1916 Act (see Resp. Lodging 50, 52), and in Section 13 of the Federal Reserve Act following the enactment of the 1918 Act (see S. Doc. No. 216, 66th Cong., 2d Sess. 146 (1920)). In addition, the Comptroller has adhered continuously to the view that Section 92 remains in effect. See 12 C.F.R. 7.7100 (1992); 12 C.F.R. Pt. 2 (1939).

Respondents also suggest (Br. 34 n.35) that if any view warrants deference, it is the view of the Office of the Law Revision Counsel, which assembles the United States Code. But the presumption arising from the codifiers' deletion of Section 92 from the U.S. Code in 1952 is undercut by the codifiers' decision to include Section 92 in the 1926, 1928, 1934, 1940, and 1946 editions of the U.S. Code. In other words, the contemporaneous view that Section 92 was not repealed in 1918 was unanimous.

4. A court may find itself bound to conclude that Congress repealed a provision of law, even though

there are indications to the contrary. But there is no reason to embrace the conclusion that Congress inadvertently repealed a statute where it is unnecessary —and, indeed, inappropriate—to do so. That is particularly so when, as here, the consequence would be the elimination of a provision relied upon by government regulators and private industry for more than three-quarters of a century. In this case, there are sound reasons to resist the conclusion that the quotation marks that appeared on the 1916 Act ultimately caused Section 92 to be repealed. As we show in our opening brief (at 21) the Senate actually voted to remove the quotation marks from the 1916 Act altogether, and respondents do not explain how they nevertheless were reinserted in the bill; what is clear, however, is that the quotation marks were not intended to have interpretive significance. On the other hand, the language and structure of the 1916 Act were intended to have meaning. Reasonably read, the text of the 1916 Act, along with the evidence from 1918, shows that Congress did not repeal Section 92, accidentally or otherwise.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Acting Solicitor General

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Nos. 92-484, 92-507

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES NATIONAL BANK OF OREGON,
Petitioner,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, et al.,
Respondents.

STEPHEN R. STEINBRINK, et al.,
Petitioners,

v.

INDEPENDENT INSURANCE AGENTS OF AMERICA, et al.,
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF THE PETITIONERS

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BRIEF OF THE AMICI CURIAE AMERICAN BANKERS ASSOCIATION, ET AL., IN SUPPORT OF THE PETITIONERS

The American Bankers Association, et al., hereby respectfully submit this brief as amici curiae in support of the Petitioners in accordance with the provisions of Rule 37.3 of the Supreme Court Rules. All parties have consented to this filing, and their written consents are filed with this brief.

INTEREST OF THE AMICI CURIAE

The national and state-based trade associations sponsoring this brief together represent virtually every commercial bank in the United States and most of their holding companies (if any), as well.

Commercial banks have relied upon the continued existence of Section 92 of the National Bank Act for the past three-quarters of a century in order to act as general insurance agents in small towns throughout much of the country. It is obvious that national banks would do so, since the law (if it exists) applies directly to those banks. But in addition to that, many state-chartered banks are affected as well. State banking laws in approximately thirty-seven states contain so-called "parity" or "wild-card" provisions that allow state chartered banks to exercise whatever powers national banks located in the state may possess, so the law applies indirectly to many state-chartered banks as well. Hundreds of banks located and doing business in small towns have invested funds, established business relationships and built reputations in their respective communities as insurance agents in reliance upon Section 92. Indeed, in some instances, the bank is the only insurance agent readily available in a small community.

In addition to those small town banks already engaged in the business of general insurance agency, there are others actively seeking to enter into that business, despite roadblocks erected by the competition. *See, e.g., Owensboro National Bank v. Moore*, 803 F. Supp. 24 (E.D. Ky. 1992), *appeal pending*, 6th Cir. Nos. 92-6330, -6331; *First Advantage Insurance v. Green*, No. 365352, 19th Jud. Dist.Ct. (Louisiana), filed January 16, 1991.

It is to protect these present and future interests of their respective members in the conduct of insurance activities in small towns that the American Bankers Association, Association of Bank Holding Companies, Association of Banks in Insurance, Consumer Bankers Association, Independent Bankers Association of America, Kansas Bankers Association, Minnesota Bankers Association, Missouri Bankers Association, Oregon Bankers Association, and Wisconsin Bankers Association respectfully appear in this case in order to urge the Court to reverse the decision of the District of Columbia Circuit below. That decision concluded that Section 92 of the National Bank Act does not exist, having been repealed, probably inadvertently, only two years after it was enacted, and in the context of an entirely unrelated legislative matter. Should that decision be affirmed, it would work great injustice to the settled expectations of commercial banks and their customers, to no good end.

SUMMARY OF THE ARGUMENT

In 1916, Congress enacted, and Woodrow Wilson signed, a bill significantly amending the three year old Federal Reserve Act. Among the multiple provisions of the statute was one that came to be known as Section 92 of the National Bank Act. It was unquestionably designed to grant to national banks located and doing business in small towns the power to sell insurance, as agent. A mere two years later, to assist in the funding of America's participation in the First World War, Congress enacted the War Finance Corporation Act. Among its multiple provisions was one that removed a restriction upon the ability of national banks to do business with these corpo-

rations. According to the District of Columbia Circuit, the latter statute repealed the former one, even though, admittedly, the subject matters of the two statutes were entirely unrelated to one another. It is only the placement of certain quotation marks in the 1916 statute that leads to this conclusion—quotation marks of unknown, clerical, origin. *Everything* else in the language of the statutes, in their manifest intent, in their legislative history, and in their subsequent treatment by Congress, by the federal regulatory agencies, by the banking and insurance industries, and by the courts, federal and state, cries out that decision below was wrong, and this Court should so hold.

ARGUMENT

I. Statutory Background

Section 5202 of the Revised Statutes of the United States was enacted in 1878, derived from Section 36 of the National Bank Act of 1864 which, in turn, was derived from Section 42 of the National Currency Act of 1863. Generally, it limited a national bank's authority to become indebted to the amount of its paid-in capital, and then set forth four short exceptions to that general rule.

In 1913, Congress enacted the Federal Reserve Act, Pub. L. 63-64, 38 Stat. 251 (1913). Section 13 of the Act contained a series of unnumbered paragraphs. The sixth one amended R.S. section 5202, setting forth its pre-existing text, including the original four exceptions to the general prohibition against excess indebtedness of national banks, and added a new fifth exception for "[l]iabilities incurred under the provisions of *the Federal Reserve Act*" (emphasis added).

Section 13 of the Federal Reserve Act then went on, in a seventh unnumbered paragraph, to authorize the Federal Reserve Board to adopt restrictions, limitations, and regulations upon the rediscount by a Federal Reserve bank of certain bills receivable, foreign bills of exchange and acceptances "authorized by *this Act*" (emphasis added).

The 1913 statute clearly did not make R.S. section 5202 a part of the Federal Reserve Act; otherwise the reference to "the Federal Reserve Act" in the amendment to R.S. section 5202 would have been superfluous. Similarly, the paragraph following the paragraph amending R.S. section 5202 was not made a part of R.S. section 5202. If it had been intended to be a continuation of the paragraph amending R.S. 5202, the internal reference to "this Act" would have made no sense whatsoever. R.S. section 5202 contained no authorization of bills of exchange or acceptances. Such an authorization was found in the second and third unnumbered paragraphs of section 13 of the Federal Reserve Act (*before* the paragraph amending R.S. section 5202.)

In summary, the amendment to R.S. section 5202 was contained only in the sixth unnumbered paragraph including the five numbered subparagraphs. The seventh unnumbered paragraph, like the first five, was part of the then new Federal Reserve Act.

In 1916, Congress amended the Federal Reserve Act. Among other things, the 1916 statute set forth a new version of section 13 of the Act "to read as follows:" The new version followed the same format as the prior version, containing a series of unnumbered paragraphs. Each of those paragraphs—with one exception—was preceded by quotations marks, which

was the grammatically correct thing to do after the phrase "to read as follows." The exception, of course, is what gives rise to the difficulty here. The unnumbered paragraph carrying forward the three-year old amendment to R.S. section 5202 was not preceded by a quotation mark. Textually, this unnumbered paragraph and its five numbered subparagraphs remained unchanged.[1] The unnumbered paragraph following the five numbered exceptions was a modification of the same paragraph as had appeared in the 1913 version of the Federal Reserve Act. It now provided for the discount, purchase and sale, as well as the rediscount of the same bills receivable, bills of exchange and acceptances "authorized by *this Act*." Again, despite the placement of quotation marks in the 1916 statute, there was no authorization in R.S. section 5202, as amended, for any such bills or acceptances.

As was earlier the case, that authorization appeared only in the Federal Reserve Act itself. Likewise as was earlier the case, R.S. section 5202's fifth numbered exception referred not to "this Act," but rather to "the Federal reserve Act," as a separate and distinct statute. The clear import of the *words* used, therefore, is that the unnumbered paragraph following the five exceptions was not a part of R.S. section 5202. Once that break is made, it is logical and grammatical to assume conclusively that unnumbered paragraphs following the bills of exchange and acceptances paragraph are likewise not part of R.S. section 5202. The unnumbered paragraph immediately following the bills of exchange and acceptance para-

[1] Except the 1916 version refers, in the fifth subparagraph, to the "Federal reserve Act," whereas in the 1913 version, the second word of that phrase also had an initial capital letter).

graph is the enactment of what subsequently became identified as section 92 of the National Bank Act.

Notwithstanding that, the District of Columbia Circuit concludes that all the paragraphs of Section 13 of the Federal Reserve Act that follow the words "Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended to read as follows:" became a part of R.S. section 5202 in 1916 because "the troublesome quotation marks are located where they are, not where the parties argue the 64th Congress intended them to be."[2] However, the placement of the quotation marks in the enrolled bill actually had very little to do with the Congress itself at all. Instead, it was quite clearly an unknown scrivener's choice of punctuation, as is shown by a comparison of the 1916 Senate and the House Conference Reports[3] on "An Act to amend the Act approved December twenty-third, nineteen hundred and thirteen, known as the Federal Reserve Act, by adding a new section," with the final enrolled bill. The Senate version of the Conference Report contains no quotation marks in any relevant spot; the House version of the Conference Report contains handwritten quotation marks, but, in relevant part, those quotation marks are not where they eventually appear in the enrolled statute. The unnumbered paragraph preceding the revision to R.S. section 5202 does not end in a quotation mark in either the House or Senate ver-

[2] *Independent Insurance Agents of America v. Clarke*, 955 F.2d 731, 739 (D.C. Cir. 1992).

[3] Copies of the two versions of the Conference Report were lodged with this Court as an Exhibit with the brief of your amici filed in support of the Petition for Writ of Certiorari on November 20, 1992.

sion of the Conference Report, but it does in the enrolled statute. The paragraph of the bill pertaining to R.S. section 5202 begins with a quotation mark in the House version of the Conference Report, but the enrolled bill does not. If *either* the Senate version or the House version had made it to the enrolled bill, we would not be here.

Two years after the passage of the relevant amendments to the Federal Reserve Act, Congress took up a bill that was later to become the War Finance Corporation Act, Pub. L. No. 65-121, 40 Stat. 506 (1918), an "Act to provide further for the national security and defense and, for the purpose of assisting in the prosecution of the war, to provide credits for industries and enterprises in the United States necessary or contributory to the prosecution of the war, and to supervise the issuance of securities, and for other purposes." The original bill did not contain the provision now said to repeal section 92. It was added as an amendment, which became section 20 of the War Finance Corporation Act. Section 20 amended R.S. section 5202 to read pretty much as it had read even prior to 1916. As noted above, the law forbade indebtedness of national banks in excess of paid-in capital, and then set forth exceptions to that general rule. Prior to the War Finance Corporation Act, there were five exceptions; the Act added a sixth: National banks could exceed indebtedness limits in case of "liabilities incurred under the provisions of the War Finance Corporation Act." When the amendment was introduced in the House of Representatives by Congressman Phelan of Massachusetts, the following colloquy took place:

> Mr. Longworth. Mr. Chairman, I reserve a point of order on that.
> Mr. Kitchin. I have examined that pretty thoroughly, and I think it ought to go in, I will say to the gentleman from Ohio.
> Mr. Longworth. *It is certainly not germane to this section.*
> Mr. Kitchin. If we do not put in this provision, and make the change in the law which this amendment makes, it will tie the hands of national banks from helping out these corporations.
> Mr. Longworth. I only reserved the point of order to hear the explanation.

56 Cong. Rec. 3804 (March 20, 1918) (emphasis added).

It was not an idle exchange. In the House of Representatives then, as now, there was a rule requiring an amendment to a bill to be germane. Rule XVI, Section 7, provided that "[n]o motion or proposition on a subject different from that under consideration shall be admitted under color of amendment." *See*: 5 A. Hinds, *Precedents of the House of Representatives of the United States* Vol. V, §§ 5753, 5767 and 5801 et seq. (1907). Since, as the District of Columbia Circuit correctly concluded, national bank insurance powers and financing of a war effort are unrelated,[4] a proposed amendment to the War Finance bill having the effect of repealing Section 92 of the National Bank Act could not have been entertained under the House's own rules. The colloquy set forth above there-

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[4] *Independent Insurance Agents of America v. Clarke*, 955 F.2d at 737.

fore establishes that the only intended change in the law was the germane addition of the sixth exception to the rule against national bank indebtedness. Not only was it the only intended change, but the only permissible one as well. Anything beyond that would have been nongermane and out of order.

II. Subsequent History

After the enactment of the War Finance Corporation Act in 1918, the law that is said to repeal Section 92, both the Comptroller of the Currency and the Board of Governors of the Federal Reserve System continued to regard Section 92 as being in full force and effect. The Comptroller of the Currency publishes, and periodically updates, a Compilation of Federal Laws Affecting National Banks. Each time, since 1918, the compilation has been republished, it has included Section 92 as a law then presently in force. Similarly, the Board of Governors publishes, and periodically updates, "The Federal Reserve Act As Amended Through. . .", and also publishes and periodically updates a "Digest of Rulings of the Board of Governors of the Federal Reserve System." Each time, since 1918, that these documents have been republished, they have included, as a part of the then-existing Section 13 of the Federal Reserve Act, the language of Section 92. When the first edition of the United States Code was issued in 1926—eight years after the War Finance Corporation Act allegedly repealed Section 92—Section 92 appeared, as such, in the compilation of the "Laws of the United States of America of a General and Permanent Character." It likewise appeared in the 1928, 1934, 1940 and 1946 editions of the United States Code. Nowhere can there

be found any evidence of an adverse Congressional reaction to any of these publications—no Congressman or Senator ever seems to have protested that the publications were incorrect since the law had been repealed.

Although no Congressional action to repeal Section 92 occurred between 1946 and 1952, the 1952 edition of the United States Code omitted Section 92. That omission *did* spark a response from Congress. Extensive hearings were held on the subject in early 1958, and "an impressive array of witnesses"[5] assured and reassured Congress that the law was still in effect. *Financial Institutions Act of 1957: Hearings on S.1451 and H.R. 7026 Before the Committee on Banking and Currency of the House of Representatives*, 85th Cong., 2d Sess. 1010-1071 (1958). The two bills to which reference is made in the title of the Hearings contained a Section 45 that would have, if enacted, "restated" Section 92. Having been authoritatively advised that Section 92 was already law, Congress took no further action to adopt proposed Section 45 of the two bills, and it, or a comparable section, did not again appear in proposed legislation pertaining to financial institutions.

The court below too quickly dismisses forty years of history as irrelevant: "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one". (*Independent Insurance Agents of America v. Clarke*, 955 F.2d at 737 (citing

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[5] *Independent Insurance Agents of America v. Clarke*, 955 F.2d at 736.

Russello v. United States, 464 U.S. 16, 26 (1983)).[6] That is not the point of the recitation of this history. The point is that, in 1958, if not before, Congress acquired

> knowledge of the construction placed upon the section by the official charged with its administration. If the legislative body had considered the [] interpretation erroneous, it would have amended the section. Its failure to do so requires the conclusion that the regulation was not inconsistent with the intent of the statute. . .unless, perhaps, the language of the act is unambiguous and the regulation clearly inconsistent with it.

Massachusetts Mutual Life Insurance Company v. United States, 288 U.S. 269, 273 (1933). (citations omitted.)

The Federal Reserve and the Comptroller had, by 1958, long interpreted the laws enacting or otherwise dealing with Section 13 of the Federal Reserve Act, Section 92 of the National Bank Act, Section 5202 of the Revised Statutes and Section 20 of the War Finance Corporation Act (with whose administration they were charged). The interpretations gave meaning and effect to the words of those statutes, and to the manifest intent of those statutes. Where there is a

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[6] Actually, this was an odd citation by the court below, since it elsewhere dismisses as irrelevant as well the intent of the earlier Congress: "Whatever the intentions of the 64th Congress in 1916, they are essentially irrelevant to the task at hand". *Id*, at 736. "[E]ven if we were persuaded that its repeal was in fact the result of cumulative mistakes by both Congresses. . .we would be hesitant to move into the breach." *Id.* at 739.

conflict between the words of a statute and its punctuation, there would seem at the very least to be sufficient ambiguity in the law so that the Federal Reserve's and Comptroller's interpretations would not fall into the category of *clearly* inconsistent with the statute.[7] If not *clearly* inconsistent, the agency interpretations may be said to have been adopted by Congress by virtue of its failure to have done anything to alter those interpretations when the matter was foursquare before the Congress.

If the mere failure to act on the matter in 1958 is insufficient evidence of legislative ratification of administrative interpretations of the law, later history is even stronger evidence. Not only did the regulatory agencies continue in their consistent view that Section 92 was valid law; the courts regularly treated the law as if it were in full force and effect as well. *See*

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[7] We would go further and maintain that the plain *language* of the statute is the best evidence of the intent of Congress, *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-375 (1986), whereas "[p]unctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed." *United States v. Shreveport Grain and Elevator Co.*, 287 U.S. 77, 82-83 (1932). In any conflict between words and punctuation, the words must prevail. In *Marine Bank v. Weaver*, 455 U.S. 551, 557 n.5 (1982), for example, this Court held that a certificate of deposit was not a security even though the statutory definition of security included the phrase "certificate of deposit, for a security." The Court read that phrase as if the comma were not present, so as to have the statute refer to instruments issued by protective committees in the course of corporate reorganizations, instead of commercial bank certificates of deposit.

Commissioner of Internal Revenue v. First Security Bank of Utah, 405 U.S. 394, 401-405 (1972); *First National Bank of Lamarque v. Smith*, 610 F.2d 1258, 1261-62 n. 6 (5th Cir. 1980); *Salyersville National Bank v. United States*, 613 F.2d 650, 652 (6th Cir. 1980); *Independent Bankers Association of America v. Heimann*, 613 F.2d 1164, 1170 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980); *Commissioner of Internal Revenue v. W. Morris Trust*, 367 F.2d 794, 795 n. 3 (4th Cir. 1966).

This Court long ago held that:

> It is doubtless a rule that when a judicial construction has been given to a statute, the reenactment of the statute is generally held to be in effect a legislative adoption of that construction. This, however, can only be when the statute is capable of the construction given it, and when the construction has become a settled rule of conduct.

The Dollar Savings Bank v. United States, 86 U.S. (19 Wall.) 227, 237 (1874).

As we have seen above, the 1916 and 1918 statutes are capable of a construction that would permit Section 92 of the National Bank Act to continue in existence, and, of course, sixty some years of history fairly clearly constitutes a settled rule of conduct. Knowing that the agencies and the courts had construed the laws to the effect that Section 92 was then in full force and effect, Congress amended Section 92 in 1982, Pub. L. 97-320 § 403(b) and in 1987 it imposed, for a limited period of time, a moratorium upon the exercise of rights that national banks otherwise would have had "pursuant to the Act of September

7, 1916 (12 U.S.C. 92)" to expand their insurance agency activities. Pub. L. 100-86 § 201(b)(5).

These two affirmative acts by Congress certainly fit within the *Dollar Savings Bank* test for legislative adoption of judicial (and administrative) construction of statutes.

CONCLUSION

The fundamental error of the District of Columbia Circuit was its unwillingness to "correct[] flaws in the language and punctuation of federal statutes" where to do so would be "to reinstate a law that, intentionally or unintentionally, Congress has stricken from the statute books." *Independent Insurance Agents of America v. Clarke*, 955 F.2d at 739.

The court *presumed* that Congress has stricken the laws from the books, *presumed* that "correcting" punctuation errors would have the effect of "reinstating" the law. But in point of fact, proper application of the rules of statutory construction as outlined above should lead to the conclusion that the law was not repealed in the first place. It was not repealed because Section 92 of the National Bank Act was never made a part of section 5202 of the Revised Statutes, so that subsequent amendments to section 5202 had no effect upon Section 92. It was not repealed because Congress did not intend to repeal it,

and "[t]he intent, not the letter of the statute, constitutes the law." *Union National Bank of St. Louis v. Matthews*, 98 U.S. 621, 626 (1879). The opinion of the court below should be reversed and remanded for consideration of the issues that were brought before it by the parties.

Respectfully submitted,

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